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Supreme Court, U.S.
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No. 05-___

IN THE

Supreme Court of the United States

CHARLES T. WILSON, *et al.*,
Petitioner,

v.

AIRTHERM PRODUCTS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Under the WARN Act, when there is a sale of a business where

(a) by the terms of an assets-only sale, the employees will not transfer to the buyer;

and/or

(b) the seller terminates all its employees, with the termination to become effective the day of the sale but before the sale becomes effective:

1. Must the seller give its employees 60 days notice of the termination?

2. If the termination is to become effective the same day as the sale but before the sale becomes effective, must the buyer give 60 days notice of the seller's termination?

3. If the seller is not required to notify its employees of their termination, is there an obligation under the WARN Act for someone to notify the employees if the buyer ends up not hiring 50 or more of the seller's employees? If so, who, and when?

4. Must the buyer give 60 days notice to the former employees if it fails to hire 50 or more of the former employees? If so, how long does the buyer have to determine whether the requisite number of former employees have been hired, and when does the 60 days begin?

II.

Where Congress considered a sale-of-business 'employment loss' exclusion provision for the WARN Act that was based on whether or not the buyer offered employment to

former employee of the seller, but rejected any such provision dealing with buyer offers of employment as unworkable:

1. May a federal court, nevertheless, judicially adopt selective parts of this rejected provision?

2. May a federal court judicially amend a federal statute to selectively adopt provisions of an Act which were considered and rejected by Congress? Or is this a violation of the separation of powers doctrine of the Constitution?

PARTIES TO THE PROCEEDING

Petitioners Charles T. Wilson, Caryless Vondran, Willie Ferell, Onixe Anderson, Dallas W. Watlington, Tommy Humphrey, Neartis Clark, Alvin Smith, Jr., Tommie Outley, Billy Fleming, Lloyd A. Nichols, Gary R. Thomas, Alvin Smith, Jimmy L. Dooley, Kenneth Rogers, William Dawson, Samuel J. Cullum, Thomas Anthony, Corey Amos, Bobby Hedrick, Charles Busby, Larry Foster, Danny Doler, Percy Graham, Cora L. Jamison, Robert Thorn, Jr., Jessie Hawkins, Curtis Bradley, Jr., Donald Barger, Almos Andrews, Jesse Lee Ferrell, Eddie Lee Hodger, Leodis Seawood, Roy Lee Coleman, Larvan Hawkins, Steven Dearing, Tracy Hill, Jeffery Wright, John Brooks Jones, Clarence Treat, Saundra House, Kevin Lawrence, Aaron Barton, Odis L. Barton, Manuel Sanchez, Jr., Stanley Barton, Evelyn Burgess, Bennie Wilson, Kristi McCain, Leo Deaviser, Ronald McFadden, Kendle Williams, Willie K. Ponder, George Robert Lawrence, Elmo Hilliard, Sammie Sinclair, Charlie L. Huckaba, Calvin Smith, Recorder Henderson, Huester Barton, Ruby Hall, Michael Stanley Norviel, Lewis E. Cook, Isacc Rogers, Carlton Hoggard, Robert Nelson, Lincoln Taylor, Jr., Terry L. Gardner, Willie White, Walter L. Taylor, Barbara K. Dye: Troy Sparkmon, Paul Roger Clardy, Lester Taggart, Andy Anderson, Daron Sparkman, Lee A. Henderson, Jermaine Davis, Charles A. Hughes, Donald Strong, James Nobles, Floyd Stokes, Clyde V. Clark, Richard Thornton, Ronnie C. McShan, James E. Fingers, Donald R. Hall, and Billy J. Jones were plaintiffs in the district court and appellees/cross appellants in the court of appeals.

Respondent Airtherm Products, Inc. was the defendant in the district court and appellee/cross appellant in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Charles T. Wilson, et al., petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Eighth Circuit in *Charles T. Wilson, et. al v. Airtherm Products, Inc.*, Eighth Circuit Nos. 04-3679/3880.

OPINIONS BELOW

The opinion of the court of appeals is reported at 436 F.3d 906 and is attached as Appendix B., pp. 2a - 13a. The summary judgment opinion of the district court is reported at 2001 WL 34818807 and is attached as Appendix D., pp. 36a - 47a. The remedy order of the district court is unreported and is attached as Appendix C., pp. 14a - 35a. The order of the court of appeals denying rehearing is reported 2006 U.S. App. LEXIS 7759 and is attached as Appendix A., p. 1a.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 2006. A timely petition for rehearing was denied on March 28, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) as the basis upon which it seeks review of the Eighth Circuit's ruling by writ of certiorari.

STATUTORY PROVISIONS INVOLVED

The Workers Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101 *et. seq.* 29 U.S.C. § 2101 (a)(2) defines a plant closing as:

> the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;

29 U.S.C. § 2101(a)(6) defines an employment loss as:

> subject to subsection (b), the term "employment loss" means (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period;

29 U.S.C. § 2101 (b) provides:

> Exclusions from definition of employment loss.
>
> (1) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 3 of this Act [29 USC § 2102], up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in ac-

cordance with section 3 of this Act [29 USC § 2102]. Notwithstanding any other provision of this Act [29 USC §§ 2101 et seq.], any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

STATEMENT OF THE CASE

Plaintiffs are former employees of Airtherm, an Arkansas corporation formerly engaged in the manufacture of heating and air conditioning products in Forrest City, Arkansas. Airtherm employed 125 employees[1] 60 days prior to the August 25, 2000, the date it terminated all its employees and effectuated a plant closing prior to the closing of the sale of Airtherm's assets to Airtherm LLC ("Mestek").[2]

On August 23, 2000, counsel for Airtherm sent a letter to Mr. Bob Anderson, Staff Representative of the United Steelworkers of America, informing him that Airtherm was in the process of being sold to Mestek, and that "prior to the closing of any sale," Airtherm would "close the plant, terminate the bargaining unit employees, and pay all eligible employees their severance pay." The letter further stated that Plaintiffs' last day of work for Airtherm would be "at the end of the shift at 3:30 p.m. on Friday, August 25, 2000." The letter

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[1] Defendant introduced an Exhibit reflecting that as of the date of sale-August 25, 2000, Airtherm Products' workforce consisted of 123 employees. (JX 12. Def. Proposed Finding of Fact No. 10.) However, there was a stipulation during the trial that this number did not include two employees who were working on June 25, 2000, 60 days prior to the plant closing, the date the notice provision was triggered, as per 20 CFR § 639.5(a)(2). Therefore, the relevant number of employees on the date the notice provision triggered was 125 or 126. (Stipulation, Vol. 1 pp. 36-38.)

[2] To avoid confusion of the parties, Airtherm LLC will be referred to as Mestek, which is the parent company of Airtherm LLC.

concluded by stating: "It is my understanding that after any sale is concluded Airtherm, LLC [Mestek] will begin taking applications for employment on Monday August 28, 2000, at 8:30 a.m. It is hoped that all of the Company's current employees will make application for employment with the new owner."

John Kaddaras, Vice-President of Mestek, notified Airtherm by letter dated August 22, 2000, that: "We give you our assurance that we will hire a substantial number of current employees. (The jobs of fewer than 50 people will be affected by termination)." In accord with the August 23rd termination notice, Airtherm terminated all its employees on Friday, August 25, 2000, effective prior to the closing of the sale. The sale of Airtherm's assets was concluded later that same date.

Commencing Monday, August 28, 2000, most of the Plaintiffs were given the opportunity to apply for employment with Mestek. The application process required Plaintiffs to file applications and then submit to an interview. Though Mestek was not contractually required to hire or accept the transfer of any of the employees, a substantial number of the former Airtherm employees were hired back before September 25, 2000—within 30 days of the date that Airtherm ceased operations. 125 employees were entitled to notice on June 26, 2000; 74 employees, many of whom were later laid off within 45 days, were eventually hired at some time after the sale by the buyer, Mestek. Most of Airtherm's former employees, some of whom had accepted employment with Mestek, filed suit against Airtherm in March 2001, alleging violations of their right to notice under the WARN Act.

The Rulings Below

The District Court

The Defendant and, eventually, the Plaintiffs, both filed motions for summary judgement in the District Court. On

September 10, 2001, the District Court issued a ruling in favor of the Plaintiffs on the merits, and set a date for a hearing on the amount of damages. Alternative amounts of damages were stipulated to by the parties, but the defendant filed a motion for the court to reconsider its summary judgment order and on March 17 and 18, 2003, the court held a trial and allowed the defendant to put on two days of testimony and submit over 100 exhibits in their defense.

After hearing the trial testimony and examining all the evidence, the district court reconsidered its original summary judgment ruling, corrected some of its earlier findings, and, again, found for the plaintiffs.

First, the trial court found that the number of Airtherm employees entitled to notice in June of 2000, 60 days prior to the termination, was 125, that the maximum number of former Airtherm employees that Mestek ever hired was 74, leaving 51or more non-hired employees at any time after the sale, and negating Airtherm's defense that only 49 employees would be deemed to have suffered an employment loss. The court held, however, that the number of employees hired by Mestek was not relevant because all the new evidence produced by the defendant at trial showed that this was not a mass lay off, but a plant closing, accomplished by Airtherm by terminating *all* its employees prior to the sale of its assets to Mestek. The court held that "the biggest problem with Defendant's 'fewer than 50 employees' argument is that it wrongly shifts the focus . . .to how many employees were not hired by a buyer rather than on the appropriate focus of how many employees were terminated by the seller." (D. Ct. Decision 9/29/04, Appendix C, p. 22a.) The court referenced the fact that hiring by the buyer had been a factor in an earlier version of the WARN Act, but "it is not the current law." (D. Ct. Decision 9/29/04, Appendix C, p. 22a.)

After a two day bench trial, the district court made a factual finding that the facts contradicted the defendant's arguments

that the termination of all Airtherm's employees was "merely technical" and that the employees were really "transferred" to Mestek.. (D.Ct. Dec. 9/24/04, Appendix C, p. 19-20a.) The court compared the original Purchase Agreement submitted by the defendant, in which all the Airtherm employees *were* to be transferred to the buyer as part of the sale, with the Amended Purchase Agreement in which this employee-transfer provision was affirmatively removed and wher , instead, Airtherm agreed to close the plant and terminate all its employees prior to the close of the sale of only its assets. The district court looked also at the fact that Airtherm followed the collective bargaining agreement requirements for a plant closing—termination of all its employees and payment of severance – with the cost of the severance payments added to the purchase price in the Amended Purchase Agreement—a payment that was unnecessary when the employees were going to be transferred to the buyer. The court also noted that while there was no WARN Act indemnification in the original Purchase Agreement, there was WARN Act violation indemnification in not one, but two, paragraphs of the Amended Purchase Agreement. As the court below found, this was an "agreement to violate the Act with indemnification." (D.Ct. Dec. 9/29/04, Appendix C, p. 34a.) The court further found that documents signed by Airtherm's attorney, and sent to the National Labor Relations Board as the official "Statement of Position of Airtherm Products,"not only admitted, but took the position that this was a plant closing. (D.Ct. Dec. 9/29/04, Appendix C, p. 34a.) The court observed that "[t]he Congress has passed its Labor and Employment Laws with a thread of continuity that prohibit an Employer from picking and choosing its status based on its forum." (D.Ct. Dec. 9/29/04, Appendix C, p. 29a.)

The Eighth Circuit

The Eighth Circuit overturned the district court's ruling. The Circuit Court's decision begins, ironically, by misstating the complaint. The Circuit Court opinion begins with the

statement, "Former employees of Airtherm Products, Inc. (API) sued API for failing to notify them of a plant closing as required by the . . . WARN Act . . . before API sold its business to Airtherm LLC (ALLC)." The complaint, however, does not state a cause of action against Airtherm for failing to warn the plaintiffs before it sold its business. It is ironic for the Eighth Circuit to make such a misstatement, because the record below shows that the plaintiffs were all given many months notice of the impending sale of the business; in fact, the evidence was that the local employees, the international representative of the employees' union, and Airtherm representatives negotiated their labor agreement earlier that same year not only with the understanding that the plant would be sold, but with a representative of the buyer at some of the negotiating sessions. What the complaint actually alleges is that Airtherm failed to give the plaintiffs 60 days warning before they were all terminated.

The Eighth Circuit ruled that the sale of a business "as a going concern"—neither a term nor a concept found in the WARN Act—immunizes a seller from WARN Act liability. The circuit court does not define the term, but simply contrasts "the sale of a business as a going concern" with "simply a sale of assets," acknowledging the Eighth Circuit case of *Burnsides v. MJ Optical*, 128 F.3d 700 (8th Cir. 1997), which held that in an asset-only sale, the seller, not the buyer, has the obligation to give WARN Act notice to employees, even if the seller does not actively terminate the employees prior to the sale, because, by the terms of the sale, the employees do not transfer over to the buyer and the buyer has no obligation to hire them. In the instant case, by the terms of the sale, this was also an asset-only sale and the employees did not transfer over to the buyer and the buyer had no obligation to hire any employees, *and* the seller actively terminated the employees. The Circuit court does not discuss these facts; however, presumably this would insulate the buyer from any obligations of WARN Act notice.

The Eighth Circuit cites the discussion found in the regulations, at 20 C.F.R. § 639.6, of the "technical termination" that occurs automatically in the event employees go from being employees of selling employer to being employees of the purchasing employer. (8th Cir. Op., Appendix B, p. 7a.) As to the findings of fact that this is not what happened in this case, and that the seller actively terminated its employees prior to the sale, it did not just "transfer" them with the sale, the Circuit Court ruled that, as a matter of law, the proper focus is not on whether a seller terminates its employees prior to the sale, because there is a presumption "that a sale of a business as a going concern involves the hiring of the seller's employees unless something indicates otherwise."

The court ruled that "[w]hen the sale of a business as a going concern is involved, the sale-of-business exclusion creates a presumption that the buyer is the employer for WARN Act purposes if the seller still employs its employees on the day of the sale." (8th Cir. Op., Appendix B, p. 9a-10a.) In this case, that presumption was rebutted by the fact that the seller legally terminated all its employees prior to the sale becoming effective and did not transfer any employees to the buyer. However, ruled the court, even though these facts look as though they dictate that "WARN Act notices were required", this is so "only if the buyer's hiring must be ignored." (8th Cir. Op., Appendix B, p. 8a) However, the Circuit court contradictorily does ignore the buyer's hiring—or lack of it—, finding at note 2 of the opinion that "[b]ecause our decision does not rest on this information, we will not scour the record to pin down the exact number" of "former API employees hired by ALLC." Ironically, the circuit court did not have to "scour the record" to get those numbers; the district court made specific findings of fact on these numbers, based evidence presented and stipulations made at trial. Rather than look at the district court's findings of what the actual hiring numbers were, however, the court found that the district court should have focused on "what API and ALLC

anticipated as to employee hiring."(8th Cir. Op., Appendix B, p. 12a, emphasis added.)

With this ruling, the Eighth Circuit has joined the Sixth and Seventh Circuits in applying part of an earlier version of the WARN Act, first referenced by the Sixth Circuit in *Wiltz v. M/G Transp. Servs.*, 128 F.3d 957 (6th Cir. 1997): "When an employee is offered continued employment by the buyer of a facility. . . that employee has not suffered 'an employment loss' that would help trigger the advance notice requirement. 100 Cong. Rec. S8377 June 22, 1988." This has been followed since by the Seventh Circuit in *International Oil, Chemical & Atomic Workers v. Uno-Ven Co.,* 170 F.3d 779 (7th Cir. 1999); and by the Eighth Circuit in *Smullin v. Mity Enterprises*, 420 F.3d 836 (8th Cir. 2005), and again in this case, the *Airtherm* case.[3] None of the aforementioned courts of appeal have seen fit to adopt any of the qualifiers of the actual June 16, 1988- version of this statutory provision; they have merely adopted the portion of the Senate discussion

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[3] The June 16,1988 version of Section 2(b), as opposed to the Senate discussion of it, above, actually read:

> (b) EXCLUSIONS FROM DEFINITION OF EMPLOYMENT LOSS—Notwithstanding subsection (a)(6), an employee may not be considered to have experienced an employment loss if—
>
> (1) the closing or layoff is the result of the sale of part or all of an employer's business and—
>
> (A) the purchaser agrees in writing, as part of the purchase agreement, to offer employment to the employee with no more than a 6-month break in employment and the agreement specifies that the employee is a third-party beneficiary; or
>
> (B) the purchaser, within 30 days after the purchase, offers employment to the employee with no more than a 6-month break in employment;

"S. 2527, AS INTRODUCED IN THE SENATE BY SENATOR HOWARD METZENBAUM, JUNE 16, 1988," LEGISLATIVE HISTORY OF S. 2527, WORKER ADJUSTMENT & RETRAINING NOTIFICATION ACT, at pp. 434-435.

quoted by the *Wiltz* court from the Congressional Record, as if it were a part of, or a legislative explanation of, the present version of the Act.

On June 28, 1988, however, Senator Oran Hatch introduced an amendment to section 2(b) of the Act, eliminating all reference to the purchaser's offering employment—in fact, striking everything from section 2(b) but the title—and substituting, instead, what became the present wording of section 2(b)(1):

> "Loss. (1) In the case of a sale of part of [sic] all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with section (3) of this Act, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with section (3) of this Act. Notwithstanding any other provisions of this Act, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale."

LEGISLATIVE HISTORY OF S. 2527, WORKER ADJUSTMENT & RETRAINING NOTIFICATION ACT, at p. 346.

Senator Hatch explained that the greatest problem with the earlier version of section 2(b),—which called for exclusions from the definition of employment loss in the event the purchaser offered the seller's employees a job,—was that "there was no clear definition of liability." LEGISLATIVE HISTORY OF S. 2527, WORKER ADJUSTMENT & RETRAINING NOTIFICATION ACT, at pp. 328 & 346. This same problem can be seen in the Eighth Circuit's circuitous discussion of anticipatory non-liability in their attempt to hinge the seller's non-liability for its actions on what might be its anticipation of actions of the buyer. In this scenario of the law, who is responsible for

giving notice of whose actions? How can one party not be responsible for its own actions, yet be responsible for anticipating the other party's actions? And how can one give anticipatory notice of actions which are not under one's own control? And just when does liability for non-notice attach in such a case of wrongful anticipation? Or is professed anticipation all that is necessary and not actuality?

The second problem Senator Hatch had with exclusion-if-the-buyer-offers-the-seller's-employees-a-job was that it was unclear to him exactly what the buyer's obligations were with regard to employing or not employing the employees of the seller, and what actions or non-actions would trigger whose requirement to give notice. As Senator Hatch explained, the only thing the sale of a business exclusion was needed to remedy was "when a business is sold to another company and the employees go off the old company's payroll and on the new one," such a transfer should not be a warnable event as a plant closing. However, making someone responsible for giving notice based on some ambiguous responsibility for the buyer to offer employment at some later date did not address that issue. This attempted fix addressed, by definition, cases in which the employees did *not* go off the old company's payroll and onto the new one, and it dealt only with anticipatory hiring, it did nothing to insure prior notice of termination, which was supposed to be the purpose of the Act. LEGISLATIVE HISTORY OF S. 2527, Worker ADJUSTMENT & RETRAINING NOTIFICATION ACT, at p. 274-275. The Eighth Circuit's adoption of the seller-can-fire-all-employees-but no-notice-is-necessary-if-it-anticipates-some-hiring-at-some-unde fined-time-after-the-sale rule returns the WARN Act to this ambiguous-liability mode.

Senator Metzenbaum admitted that one problem with his proposed version of the section on sale-of-business was not only that there was no clear definition of liability, but there was also the inevitable problem—concomitant with the no-

clear-definition-of-who-is-to-give-notice-of-whose-actions prob lem—of a period in which *no* one is liable for notice. Senator Metzenbaum agreed with Senator Hatch's amendment because:

> Under this amendment, employees will be protected throughout the process of sale. . . . Until the sale is completed, the seller has the duty to give notice. Immediately upon completion of the sale the duty to give notice is the purchaser's. Employers and affected employees will always know clearly which employer must give notice if a plant closing or mass layoff is ordered. And, most importantly, at no time will affected employees be unprotected against sudden mass layoffs or plant closings undertaken without fair notice.

LEGISLATIVE HISTORY OF S. 2527, WORKER ADJUSTMENT & RETRAINING NOTIFICATION ACT, at p. 346.

However, under the Eighth Circuit's—and the Sixth and the Seventh Circuit's—re-adoption of parts of the original version of the bill, employees are now unprotected from 60 days notice of mass termination *before* a sale of a business, because the seller can always anticipate that the buyer might hire them in the future. And, in the event the employees are terminated by the seller prior to the sale, they are unprotected from 60 days notice of "non-hiring" by the buyer *after* the sale, because, by definition of the Act, hiring or not hiring is not an event subject to WARN Act notice.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Resolve Conflicts Among the Lower Courts.

Three Circuits, the Third, Ninth and Tenth, follow the present WARN Act sale-of-business provision, 29 U.S.C. § 2101(b)(1), as currently written; while three others, the Sixth, Seventh, and Eighth, do not follow the current law, but,

rather, have adopted a part of the earlier, pre-July 13, 1988 version of the sale-of-business provision.

Circuits that Follow the WARN Act as Adopted by Congress:

Third Circuit:

The Third Circuit follows the statute as presently written. In *Kalwaytis v. Preferred Meal Sys.*, 78 F.3d 117 (3rd Cir. 1996), the original employer attempted to avoid WARN Act monetary liability by claiming credit as a "joint employer" for a subsequent contractor's hiring of all but 31 of the terminated employees. The Third Circuit rejected that argument because the original employer had not met its burden of proof that it was a joint employer, and the third circuit assigned liability to the terminating employer. The court concluded that obtaining employment with a company to whom the former employer has subcontracted the work *does not* eliminate the original employer's WARN liability. In *Kalwaytis* the employees were informed that the employer would no longer be performing the work for which the employees would normally have been recalled later, since the employer had subcontracted with another entity for that work. The employees were advised to apply to the subcontractor for employment. The new employer ultimately hired fifty-four of the employees. According to the *Kalwaytis* court the WARN Act did "not define the term 'employer' to encompass *separate* business entities."

Tenth Circuit:

The Tenth Circuit also follows the statute in its current form. The Tenth Circuit in *Headrick v. Rockwell International Corp.*, 24 F.3d 1272 (10th Cir. 1994), followed the current form of the statute in holding that where the seller does not terminate any employees, but there is merely a change in the ownership of a business, the action of a sale, in

and of itself, does not amount to a termination for purposes of the WARN Act.

Ninth Circuit:

The Ninth Circuit also follows the current statute. The Ninth Circuit in *International Alliance of Theatrical & Stage Employees v. Compact Video Services, Inc.*, 50 F.3d 1464, 1466 (9th Cir.), *cert. denied*, 516 U.S. 987 (1995), found no WARN Act liability on the part of the seller, Compact Video Services, where 309 of 314 employees were notified by the *buyer, prior to the sale*, that they would be retained. From the facts, it does not look as though the seller in *Compact Video* did anything to terminate any of its employees prior to the sale. There was a question as to whether the actions of the buyer *after* the sale amounted to an employment loss; however, the Ninth Circuit followed the current sale provision of the WARN Act and held that the seller was not responsible for any actions of the buyer. The Ninth Circuit follows the Department of Labor's commentary that the statute "allocat[es] responsibility for notice to the party to the transaction that actually makes the decision to order the plant closing or mass layoff." *Compact Video*, at footnote 2.

Circuits Which Do Not Follow the Final Version of the WARN Act:

The Sixth Circuit:

The Sixth Circuit does not follow the WARN Act as it was finally adopted. In *Wiltz v. M/G Transp. Servs.*, 128 F.3d 957 (6th Cir. 1997), to determine if the terminating employer is liable for an untimely WARN Act notice, the Sixth Circuit looked not at the number of employees who were terminated by the seller, but at the number of terminated employees who applied for jobs with, and were hired by, the buyer. In doing so, the Sixth Circuit applied the wording from the legislative history of the WARN Act: "When an employee is offered continued employment by the buyer of a facility. . . that

employee has not suffered 'an employment loss' that would help trigger the advance notice requirement. 100 Cong. Rec. S8377 June 22, 1988." What the court applied, however, was an inapposite Senate discussion of an earlier version of the sale-exclusion provision (see note 6, herein), which is not in the current law. The Third Circuit apparently ignored the fact that the buyer-job-offer version of the sale-of-business provision was taken out of the final statute.

The Sixth Circuit in *Wiltz* also equates, or perhaps confuses, the job-transfer-with-the-same-employer provision of 29 USC §2101(b), which is part (2) of section 2101(b), with the sale-of-a-business provision, which is part (1) of section 2101(b). The court cites *Moore v. Warehouse Club*, 992 F.2d 27 (2nd Cir. 1993), a case involving offers of job transfers by the terminating employer, not offers of employment with another employer, in support of its position.

Seventh Circuit:

The Seventh Circuit in *International Oil, Chemical & Atomic Workers v. Uno-Ven Co.*, 170 F.3d 779 (7th Cir. 1999), follows the Sixth Circuit in *Wiltz*, and, in order to determine whether there is any WARN Act liability in a sale of a business, looks not at whether the employees are actually terminated by the seller, but at whether or not, at some indeterminate time after the sale, the purchaser hires the old workforce minus no more than 49.

Eighth Circuit:

In the Eighth Circuit, there seems to be no WARN Act liability in the event of a sale of a business.

In *Burnsides v. MJ Optical*, 128 F.3d 700 (8th Cir. 1997), as in this case, there had been a sale of assets only, rather than a buyer acquiring the employees in the sale. The parties to the sale agreed that the seller would encourage its employees to apply for employment from the buyer. The plaintiffs in *Burn-*

sides argued that if there was an "employment loss," it was not caused by the seller, their original employer, because § 2101(b) of the Act provides an exclusion from the definition of "employment loss" caused by the seller, "in the case of a sale of part or all of an employer's business." In *Burnsides* the Eighth Circuit rejected the § 2101(b)-exclusionfor-the-seller-of-assets argument, however, as "contrary to the plain terms of the statute." 128 F.3d at 702. The court noted that:

> We doubt that §2101(b) applies to the mere sale of assets . . . Congress enacted the subsection to clarify that *when employees are transferred from seller to buyer as part of a sale,* employees have not suffered an employment loss. . . . Courts have held that §2101(b) does *not* apply to asset sales when there is no transfer of any employees into the purchaser's employment along with the purchased assets.

128 F.3 at 702 (emphasis added); citing *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1280-81, (10th Cir. 1994); and *Oil Chemical & Atomic Workers Int'l Union v. CIT Group/ Capital Equip Fin., Inc.* 898 F.Supp. 451, 457 (S.D. Tex. 1995). The Circuit therefore absolved the buyer of any duty to WARN.

In *Airtherm*, the instant case, the sale was also a sale of assets only, the buyer did not assume any employee contractual obligations, and the seller, through its attorney, actually gave all its employees a formal notice of termination that was, by its terms, effective prior to the sale. The Eighth Circuit in the instant case held that since the employees' termination was to be effective the same day the sale was to become effective, that this absolved the seller of WARN Act notice of their termination. The court seemed to hold that the employees were transferred to the buyer *as a matter of law*, ignoring the wording of the statute that "the *seller* shall be responsible for providing notice . . . *up to and including the date of the sale*." 29 USC § 2101(b)(1). The Eighth Circuit

held in the instant case that the purchaser became the employer of all these employees immediately after the sale, ignoring the fact that these employees had all been *actually* terminated by the seller employer, not just *technically* terminated by the sale's transferring them to the purchasing employer. The Eighth Circuit thereby absolved the seller of any WARN Act liability.

The petitioners respectfully request that this court resolve the conflict in all these lower court decisions and rule in favor of enforcing the WARN Act.

II.

The Eighth Circuit has Judicially Amended the WARN Act to Selectively Adopt Provisions of an Earlier Version of the WARN Act which were considered and rejected by Congress.

The Sixth, Seventh and Eighth Circuits have made failure to hire, rather than termination, a WARN event. That is not the wording of the current statute. That was, however, the wording of the pre-June 28, 1988- version of the Act, (referred to in the *Wiltz* case). The entire wording of this earlier version was removed from the WARN Act in its final version, but the Sixth, Seventh, and Eighth Circuits have effectively, judicially, amended the Act to put selective portions of those rejected provisions back into the WARN Act. For the Sixth, Seventh, and Eighth Circuits now to adopt part of a provision that Congress rejected, oversteps the authority of the court and usurps the authority of the legislative branch.

The Eighth Circuit has Substituted its Policy Decisions and Value Choices for Those of Congress. This Oversteps the Authority of the Court and Usurps the Authority of the Legislative Branch.[4]

The Eighth Circuit states that it would be "an absurd result" for the seller to be required to give WARN Act notice of termination to its employees regardless of the fact that all its former employees were later hired by the buyer. (8th Cir. Op., Appendix B. p. 12a.) Yet that was a policy decision that was made by Congress. Congress determined that actual termination of 50 or more employees—not the hiring or failure to hire 50 or more employees—was a WARNABLE event. Congress determined that the remedy was to be punitive and not make-whole, that the employer's monetary liability was to be determined by how many days its notice was short of the statutory 60, not by whether the employees suffered a wage loss: whether an employee gets another job with another employer is irrelevant and any wages he receives cannot be set-off against the penalty owed by the terminating employer. Congress determined that it would not make one employer liable for another employer's decisions or actions—just as the terminating employer is liable for not warning of its own act of termination, but is not liable for some other employer's failure to hire; so the hiring employer is not liable for failing to warn of another employer's act of termination.

Congress has made a policy decision that a sale of a business is not a warnable event, but that the actual termination of 50 or more employees is a warnable event. Congress has made a policy decision that the fact that employees are terminated prior to, or right after, a sale of a business does not exempt the employer who terminates them from WARN Act responsibility

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[4] As Robert Bork remarked in his article, *Neutral Principles and Some First Amendment Problems*, "a [c]ourt that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society." 47 IND. L.J. 1, 6 (1971).

and liability. Terminating all its employees on the day of the sale also does not exempt the employer who terminates them from WARN Act responsibility and liability, at least under the WARN Act. Under the terms of the Act as finally passed, the seller is responsible for providing notice of terminations occurring on "the effective date of the sale." 29 U.S.C. § 2101(b)(1). The Sixth, Seventh and Eighth Circuit's decisions have nullified that provision of the WARN Act, however.

The Eighth Circuit panel states that a seller should not be required to give a 60 day notice of the plant closing to its employees because "one could imagine a situation in which no employee would remain by the time the closing date arrived." That was part of employers' argument against passage of the WARN Act in the first place—that such warning would deplete their work force during that 60 days and that they would lose money. Yet, again, that was a policy decision that was made by Congress when it passed the WARN Act. For the Eighth Circuit now to contravene Congress, oversteps the authority of the court and usurps the authority of the legislative branch.

Under the final version of the WARN Act as passed, in the case of a sale of a business the seller can avoid liability for not warning its employees—*simply by not terminating them.* In the event the seller does not terminate its employees, the duty to WARN becomes the buyer's right after the sale becomes final, and the buyer is then prohibited from terminating 50 or more of these employees without giving 60 days notice. In the instant case, the seller *did* terminate its employees—but not after giving them 60 days notice as required by the act. The Eighth Circuit chose to hold that this termination three days prior to the sale was not a WARN event, thereby effectively amending the Act.

Whether a Plant Is a "Going Concern" Is Not the Issue under the Present Version of the WARN Act.

At footnote 2 of the Eighth Circuit panel's decision, it is stated that this decision "does not rest on" "the number of

former API employees hired by" the buyer, but simply whether the plant was sold as a "going concern," an exemption found nowhere in the WARN Act, past or present. According to this panel's decision, therefore, if the seller actually terminates all the employees at a plant prior to the sale—as opposed to only technically terminating its employees by transferring them to the buyer's payroll at the time of the sale (in the words of Senator Orin Hatch)—but does not make the terminations effective until the day of the sale, under this decision, the seller is absolved from any WARN Act notice requirement because it kept the plant running as "a going concern" up to the date of the sale. And the buyer, conversely, may avoid WARN Act liability even if it hires none of the former employees, but may staff this "going concern" with its own employees transferred in from its other plants, or, as happened in this case, with other people hired off the street,—because "the number of former employees later hired by the buyer" does not matter—if that the buyer eventually runs that plant "as a going concern." This is not what the WARN Act says; this is how the Eighth Circuit has, *sua sponte*, usurped Congress and amended the WARN Act.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted and the decision of the court below be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 04-3679/3880

CHARLES T. WILSON, *et al.*,
Plaintiffs/Appellees/Cross-Appellants,

v.

AIRTHERM PRODUCTS, INC.,
Defendant/Appellant/Cross-Appellee.

March 28, 2006, Decided

OPINION: The petition for rehearing by the panel filed by appellees/cross-appellants is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 04-3679/3880

CHARLES T. WILSON; CARYLESS VONDRAN; WILLIE FERELL; ONIXE ANDERSON; DALLAS W. WATLINGTON; TOMMY HUMPHREY; NEARTIS CLARK; ALVIN SMITH, JR.; TOMMIE OUTLEY; BILLY FLEMING; LLOYD A. NICHOLS; GARY R. THOMAS; ALVIN SMITH; JIMMY L. DOOLEY; KENNETH ROGERS; WILLIAM DAWSON; SAMUEL J. CULLUM; THOMAS ANTHONY; COREY AMOS; BOBBY HEDRICK; CHARLES BUSBY; LARRY FOSTER; DANNY DOLER; PERCY GRAHAM; CORA L. JAMISON; ROBERT THORN, JR.; JESSIE HAWKINS; CURTIS BRADLEY, JR.; DONALD BARGER; ALMOS ANDREWS; JESSE LEE FERRELL; EDDIE LEE HODGER; LEODIS SEAWOOD; ROY LEE COLEMAN; LARVAN HAWKINS; STEVEN DEARING; TRACY HILL; JEFFERY WRIGHT; JOHN BROOKS JONES; CLARENCE TREAT; SAUNDRA HOUSE; KEVIN LAWRENCE; AARON BARTON; ODIS L. BARTON; MANUEL SANCHEZ, JR.; STANLEY BARTON; EVELYN BURGESS; BENNIE WILSON; KRISTI MCCAIN; LEO DEAVISER; RONALD MCFADDEN; KENDLE WILLIAMS; WILLIE K. PONDER; GEORGE ROBERT LAWRENCE; ELMO HILLIARD; SAMMIE SINCLAIR; CHARLIE L. HUCKABA; CALVIN SMITH; RECORDER HENDERSON; HUESTER BARTON; RUBY HALL; MICHAEL STANLEY NORVIEL; LEWIS E. COOK; ISACC ROGERS; CARLTON HOGGARD; ROBERT NELSON; LINCOLN TAYLOR, JR.; TERRY L. GARDNER; WILLIE WHITE; WALTER L. TAYLOR; BARBARA K. DYE: TROY SPARKMON; PAUL ROGER CLARDY; LESTER TAGGART; ANDY ANDERSON; DARON SPARKMAN; LEE A. HENDERSON; JERMAINE DAVIS; CHARLES A. HUGHES; DONALD STRONG; JAMES NOBLES; FLOYD STOKES; CLYDE V. CLARK; RICHARD THORNTON;

RONNIE C. MCSHAN; JAMES E. FINGERS; DONALD R. HALL; and BILLY J. JONES.
Plaintiffs/Appellees/Cross-Appellants.

v.

AIRTHERM PRODUCTS, INC.,
Defendant/Appellant/Cross-Appellee.

February 3, 2006, Decided

OPINION:

Before MURPHY, BOWMAN, and GRUENDER, *Circuit Judges.*

BOWMAN, *Circuit Judge.*

Former employees of Airtherm Products, Inc. (API) sued API for failing to notify them of a plant closing as required by the Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. §§ 2101-09 (2000), before API sold its business to Airtherm LLC (ALLC). Concluding that API violated the WARN Act by terminating its employees' employment without guaranteeing that ALLC would hire the employees after the sale was concluded, the District Court granted summary judgment to the former employees and awarded damages in the amount of $ 515,661.92. Reviewing de novo the District Court's grant of summary judgment, *Smullin v. Mity Enter., Inc.*, 420 F.3d 836, 837 (8th Cir. 2005), we conclude that the WARN Act's sale-of-business exclusion, 29 U.S.C. § 2101(b)(1), protected API from liability in the circumstances of this case. Therefore, we reverse.

I.

API formerly engaged in the business of manufacturing heating and air conditioning products. In 2000, ALLC's parent company, Mestek, Inc., which also manufactured heating

and air conditioning products, became interested in purchasing API's business. When Mestek formed ALLC as a subsidiary for the purchase of API, Mestek decided to use the name Airtherm because that name had value in the heating and air conditioning market. On May 24, 2000, API and ALLC executed an Asset Purchase Agreement (Purchase Agreement) for the sale of API's manufacturing business to ALLC. Under the Purchase Agreement, ALLC agreed to offer employment to all of API's employees. An exhibit appended to the Purchase Agreement contained a list of API's employees. Closing was scheduled for June 30, but the parties did not close the sale on or before that date. On August 21, API and ALLC executed the First Amendment to Asset Purchase Agreement (Amended Purchase Agreement). The Amended Purchase Agreement replaced the section of the Purchase Agreement that included ALLC's promise to offer employment to all of API's employees with a section that included the following promise: "Effective on the next working day following the Closing Date, [ALLC] (a) shall offer employment to all salaried and clerical employees of [API] in St. Louis and Arkansas; and (b) shall offer employment to employees within the bargaining unit represented by the [union]." Joint Appendix at 138. The Amended Purchase Agreement also changed the closing date from June 30 to August 25. The Amended Purchase Agreement added provisions under which ALLC agreed to indemnify API for WARN Act violations and API agreed to notify the union in writing about the decision to close the manufacturing plant and allow the union to request bargaining over the effects of the plant closure. Specifically, API agreed to allow ALLC to approve the contents of the letter to the union, and once approved, ALLC promised to indemnify API for any liability under the WARN Act.[1]

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[1] In other proceedings, the union representing API's employees filed charges against API and ALLC with the National Labor Relations Board

On August 22, ALLC assured API in writing that ALLC would "hire a substantial number of [API's] current employees" such that "[t]he jobs of fewer than 50 people will be affected by termination." *Id.* at 99. The letter also included an "Employment Application Schedule" to be posted for API's employees so they would know that ALLC would accept applications from the employees on Monday, August 28, and on Tuesday, August 29. *Id.* at 100. In an August 23 letter from API's attorney to the union representing some of API's employees, API stated that it was "in the process of being sold" to ALLC and notified the union that it was exercising its rights under the labor agreement's "Severance Allowance" clause "to close the plant, terminate the bargaining unit employees, and pay all eligible employees their severance pay." *Id.* at 144. The letter also stated, "It is [API's] understanding that after any sale is concluded [ALLC] will begin taking applications for employment on Monday, August 28, 2000, at 8:30 a.m. It is hoped that all of [API]'s current employees will make application for employment with [ALLC]." *Id.* at 145.

The sale closed on August 25, the same day API terminated the employment of its employees. By September 25, ALLC had hired "a substantial number of former [API] employees."[2] *Wilson v. Airtherm Prods., Inc.*, No. 2:01 CV 00055-WRW, 2001 WL 34818807, at *2 (E.D. Ark. Sept. 10, 2001). In March 2001, a number of API's former employees, including those hired by ALLC, sued API for failing to give notice of a plant closing under the WARN Act. The District Court granted summary judgment to the employees. In de-

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regarding the sale of API's business. The charges dealt with such labor law issues as effects bargaining and successor employer. The parties settled those charges.

[2] The parties dispute the number of former API employees hired by ALLC. Because our decision does not rest on this information, we will not scour the record to pin down the exact number.

ciding this appeal, we do not address the majority of issues raised by API or the employees. Instead, we focus solely on the District Court's interpretation and application of the WARN Act's sale-of-business exclusion.

II.

The WARN Act requires an employer to provide written notice to employees at least sixty days before a plant closing. 29 U.S.C. § 2102(a)(1). The purpose of the notice requirement is to provide "workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market." 20 C.F.R. § 639.1(a) (2005). Although the notice requirement may seem straightforward, its application often depends on the WARN Act's technical definitions. For instance, the WARN Act defines plant closing as "the permanent or temporary shutdown of a single site of employment . . . result[ing] in an employment loss . . . during any 30-day period for 50 or more [full-time] employees." 29 U.S.C. § 2101(a)(2). The WARN Act defines an employment loss as "an employment termination, other than a discharge for cause, voluntary departure, or retirement." *Id.* § 2101(a)(6)(A).

Critical to this case, however, is the WARN Act's exclusion of sales of businesses from what constitutes an employment loss:

> In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing . . . up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing . . . . Notwithstanding any other provision of this chapter, *any person who is an employee*

> *of the seller* (other than a part-time employee) *as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.*

Id. § 2101(b)(1) (emphasis added). This sale-of-business exclusion stresses that the WARN Act does not automatically require a seller of a business to give notice to its employees that their employment will be terminated as a result of the sale. The regulations explain, "Although a technical termination of the seller's employees may be deemed to have occurred when a sale becomes effective, WARN notice is only required where the employees, in fact, experience a covered employment loss." 20 C.F.R. § 639.6. Therefore, we must apply the sale-of-business exclusion to the facts of this case to determine whether API—as the seller—was required to give notice to its employees of a looming employment loss due to a plant closing.

The plain language of the sale-of-business exclusion supports API's contention that the WARN Act did not require it to provide notice to its employees of a plant closing. Even though a seller of a business technically terminates the employment of its employees—it would be difficult to imagine a sale of a business as a going concern where the seller does not terminate the employment of its employees—the WARN Act does not focus on technical terminations. *See id.* Instead, the WARN Act creates a system that allocates notice responsibility between the seller of the business and the buyer of the business, and only the party actually causing employment loss due to a plant closing is required to provide WARN Act notice. As long as the seller's employees are employed by the seller on the effective date of the sale, those employees automatically are considered to be employees of the buyer "immediately after the effective date of the sale" for purposes of the WARN Act. 29 U.S.C. § 2101(b)(1).

In addition to the WARN Act's plain language strongly suggesting that API, as the seller of a business, had no WARN Act responsibility to provide notice of a plant closing in the circumstances of this case, our Circuit's recent decision in *Smullin* also supports API's position. 420 F.3d at 836-41. Similar to what happened in this case, the seller in *Smullin* terminated the employment of its employees on a Friday, the day it sold its Arkansas manufacturing plant as a going concern to the buyer. Over the weekend, the buyer interviewed and hired forty-four of the plant's sixty-eight employees. On the following Monday, the plant continued operating under the buyer's ownership. The seller's former employees sued the seller for violating the WARN Act by terminating the employment of all sixty-eight employees without proper notification. The district court granted summary judgment to the seller, and the Circuit affirmed. *Id.* at 837.

Writing for the Court, Chief Judge Loken recognized that fewer than fifty employees suffered an employment loss because the buyer immediately hired all but twenty-four of the seller's employees. Thus, the Court concluded that "WARN Act notices were required only if the buyer's hiring must be ignored," which forced the Court to consider § 2101(b)(1)'s sale-of-business exclusion. *Id.* at 838. The plaintiffs argued that the sale-of-business exclusion did not apply "because the sale took the form of a sale of assets, and the plant's employees were terminated by [the seller] with no right to be rehired by the buyer." *Id.* at 839. Rejecting this argument, the Court stated that the sale-of-business exclusion "clearly connotes any transaction that transfers all or part of the employer's overall operations *as a going concern*." *Id.* Expounding on "this functional, common sense approach," i.e., asking whether the sale of the business involves merely the sale of assets or whether it is a sale of a business as a going concern, the Court noted that this approach "is consistent with the purposes of the WARN Act because the buyer of a going concern is likely to retain a substantial proportion of the

employees of the on-going business." *Id.* The Court further opined that "defining the exclusion in this generic fashion promotes compliance with the [WARN] Act because buyers and sellers know when a transaction is intended to transfer a going concern and can determine who must give the WARN Act notice if a covered employment loss is likely to occur." *Id.*

Thus, the Court recognized that when a case involves simply a sale of assets, *see, e.g., Burnsides v. MJ Optical, Inc.*, 128 F.3d 700, 702-03 (8th Cir. 1997), *cert. denied*, 523 U.S. 1119 (1998); *Oil, Chem. & Atomic Workers Int'l Union v. CIT Group/Capital Equip. Fin, Inc.*, 898 F. Supp. 451, 456-58 (S.D. Tex. 1995), as opposed to the sale of a business as a going concern, the seller retains the WARN Act notice requirement because the seller is the party actually closing the plant that results in employment losses for fifty or more employees. *Smullin*, 420 F.3d at 839-40. Because the plant in *Smullin* was sold as a going concern, the sale fell within § 2101(b)'s sale-of-business exclusion, so that any potential notice requirement fell on the buyer's shoulders, regardless of the seller's technical termination of its employees' employment that occurred by reason of the sale itself. *Id.* at 841. Because the seller did not owe a duty under the WARN Act and because the buyer did not take any action that violated the WARN Act, the Court held that neither the buyer nor the seller violated the WARN Act. *Id.*

There can be no doubt that employees are entitled to notice under the WARN Act when a qualified plant closing occurs. *See* 20 C.F.R. § 639.4(c) ("Affected employees are always entitled to notice; at all times the employer is responsible for providing notice."). The essential question is whether the seller or the buyer is considered the employer for WARN Act purposes. When the sale of a business as a going concern is involved, the sale-of-business exclusion creates a presumption that the buyer is the employer for WARN Act purposes if

the seller still employs its employees on the day of the sale. Unless something indicates otherwise, the sale of a business as a going concern typically will not involve a qualified plant closing with resultant employment loss unless and until the buyer makes such a decision.[3]

In this case, any potential WARN Act notification requirement belonged to ALLC, the buyer of API's business as a going concern. It is undisputed that API did not terminate its employees' employment until August 25, 2000, the date of the sale. We also deem it obvious that API did not close its Arkansas manufacturing plant before August 25. Indeed, API had every reason to believe that the sale of its business would not result in a plant closing, as defined by the WARN Act, because ALLC gave every indication that it was buying API as a going concern. For example, Mestek, Inc., ALLC's parent company, formed ALLC to purchase API, thus keeping the Airtherm name for continuity of operations. In May 2000, ALLC agreed in the Purchase Agreement to hire all of API's employees. Until the Amended Purchase Agreement was executed four days before the sale closed, API absolutely had no reason to believe the sale of its business would result in a plant closing affecting fifty or more employees. When the Amended Purchase Agreement changed the section dealing with the hiring of all of API's employees, ALLC con-

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[3] This approach to applying the WARN Act's notice requirement should assist buyers and sellers of businesses in knowing who holds WARN Act responsibility. In implementing the WARN Act's sale-of-business exclusion, the Department of Labor provided practical advice to employers: "It may be prudent for the buyer and seller to determine the impacts of the sale on workers, and to arrange between them for advance notice to be given to affected employees or their representative(s), if a . . . plant closing is planned." 20 C.F.R. § 639.4(c)(2). Thus, both the seller and the buyer must be vigilant as to who bears the notification duty should one of them decide to close a plant. Indeed, the Department of Labor instructs buyers and sellers to work together to assure compliance with the WARN Act.

comitantly promised API that ALLC would hire a substantial number of API's employees such that fewer than fifty employees would lose their jobs as a result of the sale of the business.

In the face of ALLC's assurances, why would API notify its employees of a plant closing? There is no good answer to that question. A simple reading of the WARN Act—with an eye toward its purpose—prescribes that no such notice was required. Indeed, if API had given WARN Act notice to its employees in the face of ALLC's assurances, one could imagine a situation in which no employee would remain by the time the closing date arrived. ALLC, as the buyer of API's business as a going concern, certainly would not be enthused by a vacant labor pool at the time of closing. Thus, the sale-of-business exclusion and our precedent dictate that ALLC became the employees' employer for WARN Act purposes once the sale of API's business became final. Any WARN Act notice responsibilities fell on ALLC, and not on API.

The District Court asked, "[D]oes the 'sale of business' exception apply in cases like this, where assets are sold but the employees are not immediately or actually transferred to the buyer as part of the sale?" *Wilson*, 2001 WL 34818807, at *3. This question misses the mark because "nothing in [the] WARN [Act] requires a seller to insist upon a contract term guaranteeing its employees continued employment with the buyer." *Int'l Alliance of Theatrical & Stage Employees & Moving Picture Mach. Operators, AFL-CIO v. Compact Video Servs., Inc.*, 50 F.3d 1464, 1468 (9th Cir.), *cert. denied*, 516 U.S. 987 (1995). Similarly, it is presumed that a sale of a business as a going concern involves the hiring of the seller's employees unless something indicates otherwise. Focusing on whether the seller terminated its employees' employment is not the proper focus when analyzing potential WARN Act violations involving the sale of a business as a going concern.

Instead, the WARN Act takes a "functional, common sense approach," *Smullin*, 420 F.3d at 839, attempting to determine who actually effects the plant closing. An example might illustrate why the District Court's question lacked the proper focus. Assume that API terminated its employees' employment on the day of the sale of its business as a going concern without guaranteeing that its employees would gain employment with ALLC. But ALLC had assured API that ALLC would hire a substantial number of API's employees such that fewer than fifty employees would suffer an employment loss under the WARN Act. On the day after the sale, ALLC hired all of API's employees, including every employee that had been laid off by API over the past ten years. If we were to apply the District Court's and the plaintiffs' interpretation of the WARN Act, we would be required to hold API liable for failing to give WARN Act notice to its employees regardless of the fact that all of API's employees were hired by the buyer. The WARN Act does not compel such an absurd result. Without the benefit of Smullin, the District Court wrongly focused on API's technical termination of its employees' employment on the day of the sale rather than focusing on whether there was a sale of a business as a going concern and on what API and ALLC anticipated as to employee hiring.[4]

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[4] To be certain, the record paints a picture that API and ALLC may have attempted to structure the sale of API in such a way as to avoid any successor labor responsibilities for ALLC. Regardless of the effects of this conduct in the labor relations arena, this appeal focuses on the WARN Act's sale-of-business exclusion. Thus, a decision to technically terminate employment or close a plant to achieve a desired effect on labor relations does not answer the questions of whether there is a plant closing for purposes of the WARN Act or who has notification responsibility if a plant closing occurs. *See, e.g., Compact Video Servs.*, 50 F.3d at 1468.

III.

For the reasons stated, we reverse the grant of summary judgment to the plaintiffs and remand to the District Court to enter judgment in API's favor.[5]

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[5]The District Court "complimented the parties on the quality of work, the competent manner in which this case was tried and briefed, the collaboration of counsel in the production of 125 joint exhibits, as well as numerous stipulations; and, the agreement of the computations necessary for the various methods of calculations necessary depending on the fact findings and legal conclusions made that govern the remedy." *Wilson v. Airtherm Prods.*, No. 2-01-CV-00055-WRW, slip op. at 4 (E.D. Ark. Sept. 29, 2004). We echo the District Court's compliments, repeating an important sentiment expressed by this Circuit a few years ago: "Civil law is not always practiced in a civil manner. We commend both attorneys in this difficult case for their professionalism. They skillfully litigated the contentious issues and zealously represented their clients without sacrificing civility, a linchpin of our legal system. . . . We applaud their devotion to the highest standards of the law." *Cisar v. Home Depot U.S.A., Inc.*, 351 F.3d 800, 804 n.5 (8th Cir. 2003).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Civil No. 2:01-CV-00055-WRW

CHARLES T. WILSON, et al.,
Plaintiffs,

v.

AIRTHERM PRODUCTS, INC.,
Defendant.

September 10, 2001

OPINION

REMEDY ORDER

I. The Parties:

1. Defendant, Airtherm Products, Inc., (Airtherm Products) was at all times relevant to this lawsuit, an Arkansas corporation engaged in the manufacture of heating and air-conditioning products with a plant in Forrest City, Arkansas.

2. Plaintiffs, Charles T. Wilson, *et al.*, are former employees of the Defendant in the Forrest City Plant. Plaintiffs number roughly 125 employees who contend they suffered an "employment loss" for termination of their employment without being provided the required sixty days notice in violation of the Worker Adjustment and Retraining notification Act (WARN Act).[1]

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[1] 29 U. S.C. §§ 2101-2109 (1994).

II. Other Relevant Entities:

1. Mestek, Inc., (Mestek) is a corporation engaged in the manufacture and sale of heating and air conditioning equipment, having a number of manufacturing plants throughout the United states.

2. Airtherm, LLC (hereinafter Mestek)[2] is a wholly-owned subsidiary of Mestek, formed to acquire the assets of Airtherm Products and retain its name.

3. The International Union United Steel Workers of America A.F.L.-C.I.O. and its Local No. 6606 (Steel Workers or Union) were the bargaining unit at the Airtherm Plant with an existing collective bargaining agreement (Agreement) at the time of the sale.[3]

III. Factual Background:

1. On August 23, 2000, Defendant's attorney, Mr. James Moore, of Phelps Dunbar, LL., sent notice to the Staff Representative of the Steel Workers Local, Mr. Bob Anderson, that the Company was exercising its rights under Article 39 of the Agreement to close the plant and terminate the bargaining unit employees at the end of the shift at 3:30 P.M. on Friday, August 25, 2000. Final pay checks were to be mailed to all bargaining unit employees on Friday, September 1, 2000. Severance Pay to all eligible employees was to be calculated in accordance with Section 2 of Article 39 of the Agreement and was to be mailed as soon as practicable. The closing notice states "it is my understanding that after any sale is concluded, Airtherm, LLC, will begin taking applications for employment on Monday, August 28, 2000, at 8:30 A.M."[4]

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[2] To avoid confusion of the parties, Airtherm LLC is referred to in this order by the name of the parent company Mestek.

[3] JX 3.

[4] JX 10.

2. The sale of the assets of Airtherm Products to Mestek was concluded as scheduled on Friday, August 25, 2000.

3. Defendant introduced an Exhibit reflecting that as of the date of the sale—August 25, 2000, Airtherm Products' workforce consisted of 123 employees.[5] However, there was a stipulation during the trial that this number did not include two employees who were employed on June 25, 2000, the date the notice provision was triggered.[6] Therefore, the relevant number of employees on the date the notice provision triggered was 125.

4. The Asset Purchase Agreement is set out in Joint Exhibit (JX) 6 and the First Amendment to the Asset Purchase Agreement is set out in (JX) 8.

5. Airtherm terminated all of its employees on August 25, 2000.[7]

IV. Procedural Status:

On August 31, 2001, Summary Judgment was granted to Plaintiffs on the issue of liability finding that Plaintiffs' employment was terminated, severance pay issued, and the plant closed-all before the sale was finalized, without the required 60 days notice.[8]

The Parties jointly waived a trial by jury with Court approval[9] and on March 17 and 18, 2003, a bench trial was

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[5] (JX 12). Def. Proposed Finding of Fact No. 10.

[6] Stipulation Vol. I pp. 36-38.

[7] Kohlby Tr. Vol II p.262.

[8] Doc. No. 26.

[9] Doc. No. 66.

held on damages.[10] Post trial briefing was completed on July 11, 2003.[11]

The Parties have awaited a decision longer than is acceptable, and, for this I apologize. Now, it is the remedy order that the parties have long awaited and to which I turn my attention.

Before beginning the analysis, I want to compliment the parties on the quality of work, the competent manner in which this case was tried and briefed, the collaboration of counsel in the production of 125 joint exhibits, as well as numerous stipulations; and, the agreement of the computations necessary for the various methods of damage calculations necessary depending on the fact findings and legal conclusions made that govern the remedy.

V. Analysis:

A. Whether the Summary Judgment Order should be vacated:

The Defendant filed a motion to reconsider the order granting summary judgment which was denied. At trial, Defendant requested, and I allowed, testimony and exhibits that require a reconsideration of my summary judgment order. Specifically, the Defendant argues that fewer than fifty (50) employees suffered an employment loss under 29 U.S.C. § 2101(2), (the provision for plant closing); or, 29 U.S.C. § 2101(a) (3), (the provision for mass lay-off); and, therefore, the provisions of the WARN act were not triggered. To support this argument Defendant produced evidence that on August 25, 2000, the date of the sale, Airtherm had 123 employees.[12] Further, Defendant produced evidence that on

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[10] Transcripts Vol I. and Vol II. (Doc. Nos. 67 and 68) entered on May 5, 2003.

[11] Doc. Nos. 77, 78, 79, 80, 81, 88, and 98.

[12] JX 12.

September 25, 2000, Mestek had employed 74 of the former Airtherm employees, making the number of employees with an employment loss, only 49 rather than 50.

At first glance, it looks like a reconsideration of my order might be appropriate. However, when the words of the statute, the administrative regulations, and conveniently disguised facts are considered, I am even more convinced that *Burnsides v. MJ Optical, Inc.*,[13] controls, and that the duty to provide notice was definitely triggered in June when the number of employees was 125. Additionally, the Amendment to the Purchase Agreement[14] which Defendant argues was not in front of the Court when the summary judgment order was entered, strengthens the Plaintiffs case by clearly making the sale a plant closing. For the reasons set out in the discussion that follows, as well as the findings and discussion in my original order adopted here by reference, I find that Plaintiffs are entitled to a liability judgment that the Defendant Airtherm has violated the WARN Act, and the motion of the Defendant to reconsider the judgment is DENIED.

First, the mass lay-off provisions of 29 U.S.C.§ 2103 do not apply. The August 23, 2000, letter from Defendant's counsel states that the Company is exercising its rights under Article 39 of the agreement to *close* the plant, *terminate* the bargaining unit employees and pay all eligible employees their severance pay.[15] Section 39 of the Agreement states "when in the sole judgment of the Company, it decides to close *permanently* the plant or *discontinue permanently* a department of the plant or substantial portion thereof and cause the *termination* of employment. . ." (emphasis added).[16]

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[13] 128 F. 3d 700 (8th Cir. 1997), cert denied 523 U.S. 1119 (1988).

[14] JX 8.

[15] JX. 10.

[16] JX. 3 p. D0125.

Second, the notice of termination makes it clear that the date of the termination was Friday, August 25, 2000.[17] That is two days notice to 125 people. Sixty days prior to August 25, 2000, is June 26, 2000. The Notice of plant closing states that the purchaser will *begin* taking application for employment on August 28, 2000, and it is *hoped* that current employees will make application with the new owner. There is no express offer of continued employment or reasonable expectation of such from the letter. Nor is there any time commitment for when applications will be completed or when offers of employment will be made. This is precisely what the act was intended to prevent.

The Defendant argues that the persons receiving this notice did not suffer an employment loss because they come under the exclusions from the definition of employment loss found at 29 U.S.C.§ 2101(b)(1) which states:

> In the case of a sale of part or all of an employer's business, the *seller* shall be responsible for providing notice for any plant closing or mass lay off of this closing up to and including the effective date of the sale. After the effective date of the sale of part of all of an employer's business, the *purchaser* shall be responsible for providing notice for any plant closing or mass lay off in accordance with section 2102 of this title. Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

I rejected this argument in my Order.[18] Now, the Defendant argues that the Amended Purchase Agreement should be

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[17] JX. 10 p. 1.

[18] Doc. No. 26 pp. 6-11.

interpreted in conjunction with a letter from Mr. Kaderas to the to Airtherm's president dated August 22, 2000,[19]—that this termination was merely technical and the employees were simply transferred to Mestek. That is not true. Neither the letter nor the Amended Purchase Agreement state that all employees will be transferred. Neither provide an enforceable obligation of employment by the purchaser for any employee.

The most striking indication that the intention of the Mestek was not to merely transfer employees from Airtherm is a comparison of the original Purchases Agreement and the Amended Purchase Agreement That comparison reflects that, in the original purchase agreement, the buyer agrees to offer employment to all employees with comparable benefits and to assume the union contract.[20] The Amended Purchase Agreement sets out that the plant will be closed, and that the Seller will send notice to the Union of the decision to close the plant, and that the buyer will indemnify and hold harmless Seller for any WARN Act liability.[21] Additionally, the Amended Purchase Agreement increases the purchase price by the aggregate amount of all severance payments required under Article 39 of the collective bargaining agreement. There would be no severance pay if there was a mere transfer of employees. The facts contradict Defendant's argument that this was a technical transfer of employees.

Finally, a review of the case law cited by Defendant in support its contention that there was only a technical transfer reflect serious differences with the facts in this case. In *Wiltz v. M/G Transport Service, Inc.*,[22] the applications for employment with the purchaser all occurred before the closing, offers

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[19] JX 9.

[20] JX. 6 Para 4.4.5.

[21] JX 8 Para. 5.2.

[22] 128 F.3d 957 (6th Cir 1997).

to eighty-two of the workers had been made before the closing, and eight of those employees had started working before the closing.[23] That is not the case here. This was *not* the kind of technical termination that does *not* trigger the WARN Act.

Courts addressing § 2101(a)(6) that apply a "practical effects driven analysis of whether a break in employment actually occurred have all relied on the accompanying regulation to 19 U.S.C. § 2001(b)(1) which explains:

> This provision preserves the notice rights of the employees of a business that has been sold, but creates no other employment rights. Although a technical termination of the seller's employees may be deemed to have occurred when a sale becomes effective, WARN notice is only required where the employees, in fact, experience a covered employment loss.[24]

The employees at Airtherm were not transferred from one employer to another as a part of a technical sale. They experienced an employment loss with no expectation or guarantee of employment. The testimony at trial was that some employees left town the Friday of the plant closing in search of work.

Defendants also argue that *Dingle v. Union City Chair Company*[25] supports a finding of a mere technical transfer. A close look at *Dingle* reveals that of 171 employees, all but 22 began working for the new company on the next business day. Once again, that technical sale is not the type of plant closing here.

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[23] *Id.* at 959.

[24] 20 C.F.R. § 639.6 (1996).

[25] 134 F. Supp.2d 441(W.D. Pa. 2000).

The biggest problem with Defendant's "fewer than 50 employees" argument is that it wrongly shifts the focus for the determination to how many employees were not hired by a buyer rather than on the appropriate focus of how many employees were terminated by the seller. While this might have been a conceivable interpretation of an early version of the WARN Act, it is not the current law. Even if it were the law, it would not protect this Defendant in this case. Defendant makes its numeric argument by comparing the number of employees at Airtherm on the day of the plant closing, with the number of employees at the Mestek operation on various dates after the closing.[26] That is not the way it works. The DOL regulations, to which I am required to give deference state at 20 CFR § 639.5(a)(2):

> (2) The point in time at which the number of employees is to be measured for the purpose of determining coverage is the date the first notice is required to be given . . . Alternative methods cannot be used to evade the purpose of WARN, and should only be used in unusual circumstances.

Defendant's effort to focus the definition of " employment loss" on how many employees are not hired by the buyer at some time in the future, rather than on how many employees are terminated by the seller, was rejected by Congress in its decision to delete that wording in earlier versions of the WARN Act.[27]

Mestek did not guarantee employment to any employee in its application notice.[28] The Amended Purchase Agreement, at Mestek's insistence, does not agree to transfer employees. Rather it agrees to terminate all its employees on short notice

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[26] JX. 12.

[27] Doc. No. 17.

[28] JX 9 p.2.

in order to exercise the provisions in the Union Agreement that end the bargaining agreement. This is evidenced by the purchaser's agreement to increase the purchase price by the amount of severance payments required under the plant closing provision.[29] The obligation to pay severance would not arise if there was a mere employee transfer. An additional indication that the Defendant was aware that there were potential WARN Act problems is in the Amended Purchase Agreement—Mestek "agrees to fully indemnify and hold harmless Seller for any WARN Act liability."[30] This indemnification was not found in the original purchase agreement.

Defendant's request that the law be interpreted to mean that a seller may determine whether to give WARN Act notice based on the future discretionary actions of the buyer, rather than its own actions, ignores the plain wording of the statute, the enforcement regulations, and the purpose of the Act. This statute and case law do not allow a finding that a seller is immune from WARN Act because it believes that the buyer might hire or will attempt to hire terminated employees at some unknown time in the future after the sale. In fact, it is precisely this uncertainty that the Act was intended to remove.

B. Whether the severance payments made to Plaintiff's should offset Damages:

The WARN Act expressly states at 29 U.S.C. § 2104(a)(2), that the only reductions allowed are: (with emphasis added).

> (A) any wages paid **by the employer** to the employee for the period of the violation; (B) **any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation**; and (C) any payments **by the employer** to a third party

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[29] EX 8 para1.

[30]

> or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation.

In this case, the severance payments were required to be paid by Airtherm under the collective bargaining agreement existing between Airtherm and the Steelworkers at the time of the Plant Closing. The severance payments were an existing legal obligation at the time the WARN Act was triggered. Under 29 U.S.C. § 2105, "the rights and remedies provided to employees by this Act are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies."

The law does not permit the damages to be reduced by the severance as the payment of severance was an existing obligation at the time of the sale.

C. Whether the Damage Calculation for back pay includes 59 or 41 days:

While Plaintiff disagrees, the Eighth Circuit has decided that the that back pay damages due to individual plaintiffs must be figured on working days and not days of the violation.[31] That calculation is set out in Plaintiffs' corrected EX 97 and is adopted here as the appropriate back pay calculation.

D. Whether Unemployment Benefits are a Set-Off:

Congress did not intend for unemployment compensation payments to be a set-off to a back-pay award for violation of the statute. The legislative report states:

> Further, the only payments that may offset the back pay remedy are those made by the violating employer.

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[31] *Breedlove v. Earthgrains Baking Companies, Inc.*, 140 F.3d 797 (8th Cir. 1998).

> Wages received from another employer, *or unemployment compensation payments received from the State*, may not be used to offset the remedy.[32]

E. Whether the health insurance premiums paid by Mestek for some employees should be set off against Airtherm's damages:

The governing words of the statute are found at 29 U.S.C. § 2104(a)(B) which states:

> (B) benefits under an employee benefit plan. . . , including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

It seems that "the starting point in statutory construction is the language itself. If the language is clear and unambiguous, the inquiry is over."[33]

Plaintiffs argue that the recovery should be the value of their health insurance premium for the 60-day WARN Act notification period plus any expenses incurred during the loss. Defendant contends that Plaintiffs should only be able to recover the value of any medical expenses actually incurred by the plaintiffs; or, in the alternative, the value of insurance premiums during the time plaintiffs did not actually have health insurance coverage.

The problem with the Defendant's focus on the word "incurred", is that it ignores the words "**benefits under the benefit plan. . . , including the cost of medical expenses**

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[32] Report 100-575, House of Representatives Conference Report to Accompany H.R. 3, Omnibus Trade and Competitiveness Act of 1988 (100th Congress, 2d Session (April 20, 1998). (Emphasis added).

[33] *Breedlove v. Earthgrains Baking Companies, Inc.*, 963 F. Supp. 802 (E. D. Ark, 1997).

incurred" When read in context, the language of the statute is clear. The damages for the benefit of health insurance under the plan is the cost of health insurance for the two months of the violation. The parties have stipulated that the health insurance premiums would amount to $739.37 per employee for the two month violation period.[34] Additionally, a few plaintiffs have incurred medical expenses that would have been covered under the health benefit plan.[35] Those are the proper damages to be included for medical benefits.

Finally, the defendant argues that health insurance premiums paid by Mestek for some of the employees during the benefit period should be set-off against Airtherm's damages. Once again, the words of the statute control. Damages that are to be set-off are set out in 29 U.S.C. § 2104(a)(2) which states in relevant part:

> (2) the amount for which an employer is liable under paragraph (1) shall be reduced by—
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> > (C) any payment **by the employer** to a third party of trustee such as premiums for health benefits . . . on behalf of and attributable to the employee for the period of the violation).

In this case, Airtherm did not make any health insurance premium payments so there are no set-offs. Paintiffs correctly point out that the Joint committee Report states:

Further, **the only payments that may off-set the back pay remedy are those made by the violating employer**. Wages received from another employer . . . may not be used to offset the remedy. (Emphasis Added). Once again, the plain words of the statute, even without the benefit of legislative history, appear to preclude a set-off. While Defendants argue that some of the plaintiffs get a windfall, Congress has clearly

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[34] Corrected Ex. 97.

[35] JX 64 through 71 and also in Corrected EX. 97.

defined what is to be excluded from damages. Congress has not included payments made by new employers to be within its definition. This double recovery for a limited number of the Plaintiffs is akin to the common law collateral source rule, that "recoveries from collateral sources do not redound to the benefit of a tort-feasor, even though double recovery for the same damage by the injured party may result."[36]

F. Whether there are damage set-offs regarding the defined pension plan:

Airtherm had a defined benefit pension plan. That plan is set out in the Retirement section of the Agreement between the Airtherm and the Steelworkers.[37]

The WARN Act section governing a defined pension plan is set out at 29 U.S.C. § 2104 (a)(2) which states:

> In addition, any liability incurred under paragraph (1) with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

The parties have stipulated that the proper remedy under this section would be a service credit for all purposes under the pension plan for the two months of September and October 2000 for Plaintiffs not already credited.

Finally pension benefits drawn by other Plaintiffs, such as Hoggard are not a set off against damages since they are benefits payable as compensation for past services whether or not the shut down violated the Act.[38] The damages are set out on corrected exhibit 97.

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[36] *Bell v. Estate of Bell*, 318 Ark. 483, 490 (1994).

[37] JX. 3, p.39.

[38] Joint Congressional Committee Report § 8.

VII. Whether House and Hoggard who were salaried employees and not part of the collective bargaining unit should have their claims dismissed.

The Defendant argues that House and Hoggard should be dismissed because they were salaried employees, not part of the bargaining unit; and, that one week before the sale of Airtherm, the First Amendment to the Asset Purchase Agreement obligated Mestek to offer employment to **all** (emphasis added) salaried and clerical employees.[39] Defendant suggests that proof of this is that House and Hoggard did not have to fill out an employment application to continue working for one week after the sale, thereby suffering no employment loss while employed by the Defendant. Finally, Defendant argues that the House and Hoggard claims should be dismissed because, at the end of the week following the sale, Hoggard was laid off and paid $7,500 in exchange for his execution of a Settlement Agreement.[40] And, House was laid off and paid $2,129 in exchange for her execution of a Settlement Agreement.[41] I reject the arguments.

First, a review of the Settlement Agreement reflects that the settlement was made for potential ADEA claims against Mestek when the employees were terminated after only one week of employment. There is no settlement with this Defendant and no release of claims against this Defendant. The Settlement Agreement specifically releases only Title VII and ADEA claims, and follows the requirements of the Older Workers Benefits Act. There is no mention of WARN Act claims, and, the agreement reserves benefits required by law. Second, the violating employer here is the Defendant, and money received from Mestek are not an off-set against damages.

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[39] JX 8 Section 3.4

[40] JX. 14.

[41] JX 15.

Airtherm cannot now re-litigate the charge filed with the National Labor Relations Board (NLRB) where both Airtherm and Mestek argued successfully that Mestek was not a successor employer, that Airtherm was not in privity with Mestek and Mestek and Airtherm are not alter egos nor an integrated enterprise.[42] Here, where the NLRB has dismissed the alter/ego employer charge, the Defendant is estopped from taking a position contradictory to that taken before the NLRB.[43] The Congress has passed its Labor and Employment Laws with a thread of continuity that prohibit an Employer from picking and choosing its status based on its forum.

Finally, the Plaintiffs argue persuasively that the Defendant is attempting to avail itself of an earlier version of the WARN Act that was rejected. I am required to interpret the language of the statute as passed. The nail in the coffin on Defendants argument is that it does not list House and Hoggard on its list of "Airtherm employees employed by Mestek as of 9-25-2000.[44] While it is true that House and Hoggard were not asked to fill out an application, it is because an offer of employment was never intended, but only a week's work doing inventory.

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[42] JX. 100 Position Statement of Airtherm Products, Inc. To NLRB, 10/18/00; JX 102, Position Statement of Mestek, Inc., dba Airtherm LLC, to NLRB, 12/19/00; JX 101. Position Statement of Airtherm Products, Inc., to NLRB, 01/02/01; and JX 104, Notice from NLRB to United Steelworkers of America of dismissal of alter ego/single employer charge against Airtherm Products, Inc., and Airtherm, LLC, if not withdrawn, 01/19/01.

[43] See, for example, *Hotel Employees & Restaurant Employees Int'l Union, Local 274 v. Stadium Hotel Partners*, L.P., 10 I.E.R. Cas (BNA) 1064 (E.D.Pa. 1995) where purchaser was collaterally estopped from taking a position adverse to those in prior administrative and judicial proceedings involving other labor law issues.

[44] JX 13.

H. Whether the Settlement Agreement with the Union Precludes Recovery:

The controversy between and among these employers before the national Labor Relations Board (NLRB) is set out in Joint Exhibits 100-104. On February 8, 2000, the Union entered into an settlement agreement with Airtherm Products, Airtherm, LLC, and Mestek regarding the matters pending before the Board.[45] Defendant argues that this settlement was intended to be global and was to include WARN Act Claims, that the release language requires a finding that the Union was acting on behalf on its employees, and that in exchange for consideration, the Union on behalf of its members negotiated for the settlement and release of all claims of the Union employees related to the termination of their employment.

At the outset, under the WARN Act, "the rights and remedies provided to employees are in addition to, and not in lieu of any other contractual or statutory right.[46] Any waiver by an individual of a statutory labor law claim has to be "voluntary and knowing".[47] Courts require that "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy.[48] Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.[49] The

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[45] JX 17.

[46] 29 U.S.C.§2105.

[47] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, n.15 (1974); *Leavitt v. Northwestern Bell Telephone Co.*, 921 F.2d 160, 162 (8th Cir. 1990).

[48] *Midstate Horticultural Co., v. Pennsylvania R. Co.*, 320 U.S. 356 (1943).

[49] *Barrentine v. Arkansas Best Freight System*, 450 U.S. 728, 734-35 (1981).

purpose of the WARN Act is not only to protect workers but also to provide notice to the State so that it can provide assistance to dislocated workers.[50] The purpose of the WARN Act cannot be carried out if the settlement of unfair labor practices acts as a set-off of payments to which employees are entitled for the acts violation.

Back payments for unfair labor practices under the NLRB do not offset WARN Act damages and vice versa.[51] *Dallas Times Herald* states that 'payments required under the WARN Act may not be credited against payments required by the NLRA, even where both payments are made by a violating employer.

The purpose of the WARN Act could not be carried out if the Union could waive individual statutory rights without notice to the individuals, and without consideration to the individuals for the waiver. Defendant cited *NLRB v. Allis-Chalmers Manufacturing Co.*,[52] for the proposition that "a union may waive a member's statutory protected rights." Plaintiff correctly points out that this quote not found in the case, and is also not to be found in *NLRB v. Magnavox*,[53] and that the holding in *Magnavox* supports Plaintiff's argument, and not that of the Defendant. While the union may give up its separate right to bring suit, and agree to refrain from aiding individual suits, it may not waive the individual rights of its individual members to remedies under the WARN Act. The settlement agreement specifically waives only the Union's rights and not those of the individuals.[54] The Union did only what it was entitled to do. This settlement Agree-

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[50] 20 CFR § 639.1(a).

[51] *Dallas Times Herald Printing Co.*, 315 NLRB No. 700, 147 BNA LRRM 1281 (1994)..

[52] 388 U.S. 175, 180 (1967).

[53] 415 U.S. 322,325 (1974).

[54] JX 17 p.6.

ment was for the potential unfair labor charges set out in Doc. No. 78 pps. 11 and 12, and did not include any knowing and voluntary individual waivers to WARN Act claims.

Defendant stipulated at trial that none of the documents signed by the individual Plaintiffs were releases but merely receipts.[55] I was convinced by the testimony at trial that not a single Plaintiff knew they were settling any rights they had under the WARN Act. Plaintiffs have demonstrated that the settlement agreement was not in settlement of WARN act claims, but in settlement of charges pending before the NLRB.

I. Whether the Award should be reduced because the Defendant's violation was in Good Faith:

Congress has given district courts discretion to reduce damages awarded for WARN Act violations if the employer can demonstrate "that it had reasonable grounds for believing that its conduct was not a WARN Act violation."[56] This is an affirmative defense so the Defendant has the burden of proof.

Plaintiffs point out that Defendants had listed, but did not call the labor counsel upon whom they had supposedly relied. It is also true that the attorney-client communications often become discoverable when the good faith is raised as an affirmative defense.[57] Here, the Plaintiffs sought and Defendant resisted discovery of these communications. Further Plaintiffs correctly point out that the production of weaker evidence than the file or testimony of counsel, at the very least allows an adverse inference.[58] While this is true, I do

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[55] Tr. Vol. II p. 296.

[56] 29 U. S. C.§ 2101(a)(4).

[57] *Local 1239 Int. Brotherhood of Boilermakers v. Allsteel*, No 94 C 3552 pp 14-15, 1994nU.S. Dist. Lexis 7884, 10 BNA IER Cases 1339 (N.D. Ill. June 7, 1995).

[58] *Clifton v. U.S.*, 45 U.S. 242 (1846) and (AMI 105A).

not think it necessary. Even without the benefit counsel's testimony of communications on the issue of WARN Act liability, there are documents in this record that preclude a finding of good faith.

Defendant's documents presented to the NLRB[59] as well as the First Amendment to the Asset Purchase Agreement[60] rather than demonstrating good faith, demonstrate that the defendant had reasonable grounds for believing that its actions were a violation of the WARN Act. Mr. Kaderas, the VP of the purchasing employer, admitted on the stand that his purpose in wanting the plant closed was to prevent Mestek from being bound by the union contract by becoming a "successor employer."[61] Airtherm agreed to close the plant, and terminate all of its employees with only one day's notice, so Kaderas could avoid the union contract. For that, Kaderas agreed to "fully indemnify Airtherm for any WARN Act liability." This is evidence of a knowing possibility of violation of the WARN Act.

Airtherm's only witness, Mr. Kohlbry did not testify that he acted on the good faith advice of counsel, but on his own personal understanding and non-binding assurance from Mestek's VP, Mr. Kaderas that there was no violation of the WARN, Act. Mr. Kaderas's counsel would certainly have a conflict to give legal opinion to both seller and purchaser. And, the testimony of the Defendant's counsel was not offered. I find that no evidence was introduced on which a finding could be made that there was reliance on counsel for Defendant that the Act had not been violated and that the only reasonable inferences are that Defendant suspected that complying with Mestek's insistence on closing the plant to

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[59] JX 100, 101, 102.

[60] JX 8 p.5, Para. 5, 5.1 and 5.2.

[61] Tr. Vol II. P.159.

terminated the union contract was a violation of the Act for which it sought and indemnification.

Indifference to federal law, even when one will be indemnified for the violation, cannot be the basis of a good faith finding on which the damage award can be reduced; and, I decline to do so. Even "off the cuff" consultation with an attorney or a "rather simplistic opinion of labor counsel" has been found unpersuasive when reasonableness was lacking."[62] Here, Defendant introduced documents signed by Mr. Moore in its Statement of Position of Airtherm's Products, Inc. to Mr. John Broder, Sr. Examiner NLRB that this is a plant closing.[63] Moore states this position again in his letter to Mr. Pedro Argullo, Field Attorney for NLRB Region 26.[64] If Defendant had a legal opinion that this Plant closing was not a violation of the WARN Act it should have been presented, because these documents require rejection of the argument.

An agreement to violate the Act with indemnification cannot serve as the basis for a good faith finding. The award should not be reduced since the Defendant has not met its burden.

VI. Conclusion:

The exhibits provided by the parties appear to have made all of the computations necessary to determine the relief for each Plaintiff once the parties have the benefit of my findings and conclusion on each issue decided in the remedy order. If any further decision is needed from the Court, counsel must file a motion within 10 days.

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[62] *Washington v. Aircap Indus. Inc.*, 860 F. Supp. 307, 318 (D.S.C. 1994); United *Paperworkers Int'l Union v. Alden Corrugated Container Corp.*, 901 F. Supp. 426, 443 (D. Mass 1995).

[63] JX. 100.

[64] JX. 101.

Postjudgment interest at the rate of 2.14% is awarded from the date of the judgment. Motion for Attorneys fees and costs should be filed within the time limits set by the local rule.

IT IS SO ORDERED this 29th day of SEPTEMBER, 2004.

UNITED STATES DISTRICT JUDGE
/s/ WM. R. WILSON

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APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Civil No. 2:01-CV-00055-WRW

CHARLES T. WILSON, *et al.*,
Plaintiffs,

v.

AIRTHERM PRODUCTS, INC.,
Defendant.

September 10, 2001

OPINION

AMENDED ORDER GRANTING SUMMARY JUDGMENT TO PLAINTIFFS ON LIABILITY

Plaintiffs, Charles T. Wilson, *et al.*, bring this action claiming Airtherm Products, Inc. ("Airtherm") terminated their employment without providing them sixty day's notice in violation of the Worker Adjustment and Retraining Notification Act ("WARN Act").[1] Pending are: Defendant's Motion for Summary Judgment (Doc. 6) and Plaintiffs' Response (Doc. 17); and Plaintiffs' Motion for Summary Judgment (Doc. 15) and Defendant's Reply (Doc. 18). For the reasons set forth below, Plaintiffs' Motion for Summary Judgment is GRANTED, and Defendant's Motion for Summary Judgment is DENIED.

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[1] 29 U.S.C. §§ 2101-2109 (1994)

Background

Plaintiffs are former employees of Airtherm, an Arkansas corporation formerly engaged in the manufacture of heating and air conditioning products in Forrest City, Arkansas. Airtherm employed roughly 126 employees who, Plaintiffs contend, suffered an "employment loss" prior to the closing of the sale of Airtherm's assets to Airtherm LLC ("Mestek").[2]

On August 24, 2000, counsel for Airtherm sent a letter to Mr. Bob Anderson, Staff Representative of the United Steelworkers of America, informing him that Airtherm was in the process of being sold to Mestek, and that "prior to the closing of any sale," Airtherm would "close the plant, terminate the bargaining unit employees, and pay all eligible employees their severance pay." The letter further stated that Plaintiffs' last day of work for Airtherm would be "at the end of the shift at 3:30 p.m. on Friday, August 25, 2000." The letter concluded by stating: "It is my understanding that after any sale is concluded Airtherm, LLC [Mestek] will begin taking applications for employment on Monday August 28, 2000, at 8:30 a.m. It is hoped that all of the Company's current employees will make application for employment with the new owner."

John Kaddaras, Vice-President of Mestek, notified Airtherm by letter dated August 22, 2000, that: "We give you our assurance that we will hire a substantial number of current employees. (The jobs of fewer than 50 people will be affected by termination)."[3] Though Mestek was not contractually required to hire or accept the transfer of any of the employees, a substantial number of the former Airtherm

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[2] To avoid confusion of the parties, Airtherm LLC will be referred to as Mestek, which is the parent company of Airtherm LLC.

[3] *See* Doc. 7, Ex. A

employees were hired back before September 25, 2000—within 30 days of the date that Airtherm ceased operations.[4]

In accord with the August 24th termination notice, Airtherm terminated its employees on Friday, August 25, 2000. The sale of Airtherm's assets was concluded later that same date. Commencing Monday, August 28, 2000, Plaintiffs were given the opportunity to apply for employment with Mestek. The application process required Plaintiffs to file applications and then submit to an interview.[5] Although some of the Plaintiffs accepted employment with Mestek, all filed suit against Airtherm in March 2001, alleging violations of their right to notice under the WARN Act.

In support of its position that it was not subject to the requirements of the WARN Act, Airtherm asserts two arguments: 1) the "sale of its business" to Mestek exempts it from WARN coverage under 29 U.S.C. § 2101(b) because the sale basically resulted in a *transfer* of its working population from its employ (as the seller) to the employ of Mestek (as the purchaser), and that, *per se*, none of the employees actually suffered an employment loss; and 2) even if the sale of Airtherm's assets did trigger a WARN event, fewer than fifty employees suffered an "actual" WARN Act "loss of employment" because Mestek hired a substantial number of Airtherm's terminated employees.

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[4] Attached to Airtherm's brief is a breakdown of the employee population beginning August 28, 2000. Airtherm included the information in an attempt to demonstrate that "fewer than fifty employees suffered 'employment loss'" after the rehiring process ended. However, as explained later in this opinion, the critical issue is not what occurred with the employees after the plant exchanged hands, but whether the employees were given proper notice before being terminated, while still employed by Airtherm. Thus, is it unnecessary to cover the history surrounding the rehiring process.

[5] *Id.*

Plaintiffs respond that the WARN Act's "sale of a business" exclusion is not applicable to this case, and even if it is, Airtherm's actions resulted in an "actual" loss of employment. Plaintiffs also contend that because Airtherm terminated Plaintiffs before the effective date of the sale, it cannot offset its liability by relying on the fact that Mestek hired a substantial number of former Airtherm employees.

Standard for Summary Judgment

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided solely on legal grounds. *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); Fed. R. Civ. P. 56. The Supreme Court has established guidelines to assist trial courts in determining whether this standard has been met:

> The inquiry is the threshold inquiry of determining whether there is a need for trial—whether, in other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

The Eighth Circuit Court of Appeals has cautioned that summary judgment should be invoked carefully so that no person will be improperly deprived of a trial on disputed factual issues. *Inland Oil & Transport Co. v. United States*, 600 F.2d 725 (8th Cir. 1979), *cert. denied*, 444 U.S. 991 (1979). The Eighth Circuit set out the burden of the parties in connection with a summary judgment motion in *Counts v. M.K. Ferguson Co.*, 862 F.2d 1338 (8th Cir. 1988):

> [T]he burden on the moving party for summary judgment is only to demonstrate, *i.e.*, '[to] point out to the District Court,' that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not

> contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.

Id. at 1339. (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-274 (8th Cir. 1988) (citations omitted) (brackets in original)). Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. *Anderson*, 477 U.S. at 248.

Discussion

The WARN Act is designed to give "workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market."[6] The Act requires that any business enterprise that employs 100 or more employees, excluding part-time employees, must give sixty days advance warning before any "plant closing" or "mass layoff."[7] A "plant closing" is the permanent or temporary shutdown of a single site of employment that causes an "employment loss" for fifty or more employees during any thirty-day period.[8] Airtherm was a business entity that employed over 100 full-time employees; it closed its

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[6] 20 C.F.R. 639.1 (1995).

[7] 20 U.S.C. § 2101 *et seq.*

[8] *Id.* § 2101(a)(2).

plant on August 25, 2000, and it terminated all of its employees that same day.

An "employment loss" is defined as: "an employment termination other than a discharge for cause, voluntary departure, or retirement . . . ."[9] The Plaintiffs were unquestionably terminated, but they were not fired for cause, they did not voluntarily quit, and they did not retire. By definition then, they suffered a WARN Act employment loss. Nonetheless, Airtherm contends that, because Mestek hired a majority of the terminated employees, fewer than fifty of Airtherm's former employees actually suffered an employment loss. Stated differently, Airtherm contends that its former employees were "transferred" to Mestek, and did not actually suffer an employment loss. If, however, the Plaintiffs were merely transferred, then why were they fired; why were they left wondering if they would find new employment for several days; and why did they have to go through Mestek's application process in hopes of finding new employment with a new company? In fine, the Plaintiffs were terminated, not transferred.

Airtherm next argues that, even if the Plaintiffs did suffer an employment loss, the WARN Act's "sale of business" exception applies in this case, so that Airtherm was not obligated to give the Plaintiffs sixty days notice. The question is, does the "sale of business" exception apply in cases like this, where assets are sold but the employees are not immediately or actually transferred to the buyer as part of the sale?

The WARN Act's "sale of business" exception is set forth in 29 U.S.C. § 2101(b)(1), which provides in pertinent part:

> *In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing* . . . in accordance with section

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[9] *Id.* § 2101(a)(6).

> 2102 of this title, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing . . . in accordance with 2102 of this title. Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale *shall be considered an employee of the purchaser immediately after the effective date of the sale*. (Emphasis added)

In determining whether this exception applies to this case, the starting point is the language of the statue itself.[10] It is clear from statute's plain language, that the "sale of business" exception covers situations where the total ownership of a business changes hands (*i.e.*, a merger, sale, or takeover of the control of company). In such a situation, the buyer would, of course, automatically acquire the obligations of the prior owner, including employment contracts and agreements. The exception also contemplates the sales of "part . . . of an employer's business" where the responsibilities of the seller are transfer to the buyer. For example, in *Headrick v. Rockwell Int'l Corp.*,[11] the Tenth Circuit held that an agreed transfer of responsibilities from one contractor to another, was a "sale" within the meaning of WARN, and was not a "termination" of employees under the Act. The agreement transferred all responsibilities for operations at the operation facility, and the transferee assumed the transferor's liabilities relating to the facility's operation "with the expectation that it

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[10] If the language is clear and unambiguous, the Court may end its inquiry. *United States v. McAllister*, 225 F.3d 982, 986 (8th Cir. 2000). If the statute is susceptible to more than one reasonable interpretation, however, then the reviewing court must look beyond the statute in an effort to ascertain the intent of the legislative body. *United States v. Standard Brewery*, 251 U.S. 210 (1920).

[11] 24 F.3d 1272 (10th Cir. 1994)

would operate the facility with [the transferor's] former employees."[12] Because the sale of "part" of an employer's business contemplated the transfer of the employees to the buyer, notice was not required under the § 2101(b)(1) exception.[13]

In *Burnsides v. MJ Optical*,[14] the plaintiffs worked for Commercial Optical Company ("Commercial"). Due to financial problems, Commercial entered into negotiations with MJ Optical to have its business purchased, and to have MJ Optical take over operation of the plant. However, after MJ Optical recognized that the plant would not be profitable, it offered to buy Commercial's equipment, tools, and supplies for $100,000, inventory for cost, and intangibles for $100. The agreement specifically excluded accounts receivable from the sale and provided MJ Optical would not assume Commercial's liabilities.

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[12] *Id.* at 1274.

[13] In discussing the purpose and legislative history of § 2101(b)(1), Retired Associate Supreme Court Justice Byron White, writing for the Tenth Circuit, noted: "In that section Congress explicitly stated that employees who find themselves *transferred from one company to another* because of a sale simply are not to be held by any court to have suffered a remediable 'employment loss' . . . ." In offering § 2101(b)(1) as an amendment to the WARN Act, Senator Hatch commented:

> "There is no question that under [the WARN bill prior to inclusion of the sales exclusion], when a business is sold to another company and *the employees go off the old company's payroll and on the new one*, a plant closing for the purposes of this act has taken place." Senator Hatch apparently offered the 2101(b)(1) exception to remedy the vulnerability of business owners who sell their businesses, and, in doing so, create a "technical break in employment" for their employees even though those employees are simply transferred from one payroll to another. In this case, there was no "technical" break; there was an actual break in employment for several days.

[14] 128 F.3d 700 (8th Cir. 1997)

The agreement set the closing on May 7, and provided that, from closing up to 45 days later, MJ Optical would be given access to Commercial's building to remove the purchased assets, but would be prohibited from manufacturing there. Rather than transferring employees from Commercial to MJ Optical, the parties agreed that Commercial would encourage its employees to apply for employment with MJ Optical. At about 3:00 p.m. on May 7, Commercial informed its employees about the sale of assets and the closing of the facility that same day. Commercial's attorney, comptroller, and human resource manager all addressed the employees. Michael Hagge, MJ Optical's president, told Commercial's employees that MJ Optical wanted to hire as many people as possible, and the employees should apply. Later that afternoon, MJ Optical began removing equipment from Commercial's building. Some former Commercial employees later applied with MJ Optical, which hired some of the applicants and rejected others. The former employees filed suit against MJ Optical, Commercial, Commercial's affiliated companies, and Sheldon I. Rips, Commercial's former president, director, and owner, asserting they failed to give the employees timely notice of employment loss in violation of the WARN Act.[15]

In addressing whether MJ Optical, as the new owner, was responsible under § 2101(b) for providing notice of loss of employment, the Eighth Circuit stated:

> *We doubt that § 2101(b) applies to the mere sale of assets in this case.* Congress enacted the subsection to clarify that *when employees are transferred from seller to buyer as part of a sale, employees have not suffered an employment loss. See Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1280-81 (10th Cir.1994) (White, J.). *Courts have held that § 2101(b) does not apply to asset sales when there is no transfer of any employees*

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[15] *Id.* at 701.

> *into the purchaser's employment along with the purchased assets. See Oil, Chem. & Atomic Workers Int'l Union v. CIT Group/Capital Equip. Fin., Inc.*, 898 F.Supp. 451, 457 (S.D.Tex.1995).[16]

It appears then that § 2101(b)(1) applies only to asset sales when at least some of the employees are actually transferred "along" with the purchased assets, and not to asset sales where, in cases such as this, there is no actual transfer of any employees.[17]

In the case at bar, the contract between Airtherm and Mestek did not contemplate the transferring of the employees along with the purchased assets. Instead, Mestek purchased specified assets from the Airtherm's plant, but did not contractually obligate itself into accepting the employment of any of the Plaintiffs. As a matter of fact, it seems that Plaintiffs could not have been part of the bargain for the final sales agreement between Airtherm and Mestek because the Plaintiffs were no longer employees of Airtherm at the time the agreement was completed—it seems unlikely that a business could contractually transfer employees it did not have.

It should also be noted that the last part of the "sales of business" exception states:

> Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser *immediately* after the effective date of the sale.[18] (Emphasis added)

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[16] *Id* at 702 (emphasis added).

[17] *See* Page 5 of this opinion (explaining why Plaintiffs were terminated and not transferred).

[18] 29 U.S.C. § 2101(b)(1) (emphasis added).

There is no dispute that, after the Plaintiffs were fired, there were several days between the day the sales agreement became effective (August 25th) and the days some of the Plaintiffs were hired by Mestek (August 28th and 29th). Plaintiffs were unemployed during that gap in time. That being so, not one of the Plaintiffs was capable of being "considered an employee of the purchaser *immediately* after the effective date of the sale."[19]

As discussed above, John Kaddaras, Vice President of Mestek, wrote a letter to Airtherm that assured them that a substantial number of Airtherm employees would be hired after the sale was completed. First, that letter was not a binding contract and was not incorporated by reference into the sales contract. Second, and more importantly, Mestek required the Plaintiffs to submit an application process before giving them a *chance* at new employment.[20] That chance at employment (even if it was a good chance) suggests anything but the *automatic and immediate* transfer of employees between seller and buyer.[21]

Plaintiffs' employment was terminated, severance pay was issued, and the plant was closed—all before the sale was finalized. This was all accomplished without a binding agreement between Airtherm and Mestek about the transfer of those employees. Thus, the § 2101(b) exception does not apply to this case, and Airtherm should have given the Plaintiffs at least 60 days notice before terminating them.

Defendant argues that my view of the "sale of business" exception somehow creates an obligation on sellers to incorporate the transfer of its employees into their contracts whenever they sell their assets and close down. This is in-

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[19] *Id.*

[20] Doc. 7, Ex. A.

[21] § 2101(b)(1) (emphasis added).

correct. The WARN Act absolutely does not require a company selling its assets to contractually obligate themselves into transferring their employees as part of the sale. But, if the employees are not being be transferred as part of the deal, and if they are going to be terminated without some form of guarantee of being hired by the buyer, then the seller is obligated by the WARN Act to give them sixty days notice of their impending unemployment. This appears to be true even when the seller is optimistic that most of the employees will be hired by the buyer. Airtherm did not give the Plaintiffs sixty days notice; it did not contractually transfer the employees to Mestek; and, in the process, it violated the WARN Act.

Conclusion

With regard to all liability issues, I find there are no material questions of fact remaining for trial. I further find that Plaintiffs have met their burden of proving a violation of the WARN Act, and that Airtherm will be held responsible for its failure to give notice as required under the Act.

Plaintiffs' motion for summary judgment on WARN Act *liability* is GRANTED, and Airtherm's motion for summary judgment is DENIED. The damages issue remains for trial.

IT IS SO ORDERED this 10th day of September, 2001.

/s/ William R. Wilson
UNITED STATES DISTRICT JUDGE

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APPENDIX E

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT, 29 U.S.C. 2101, *et seq.*

CHARLES T. WILSON, *et al.*,
Petitioner,

v.

AIRTHERM PRODUCTS, INC.,
Respondent.

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§ 2101. Definitions; exclusions from definition of loss of employment

(a) Definitions. As used in this Act [29 USC §§ 2101 *et seq.*]—

(1) the term "employer" means any business enterprise that employs—

(A) 100 or more employees, excluding part-time employees; or

(B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);

(2) the term "plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;

(3) the term "mass layoff" means a reduction in force which—

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for—

(i) (I) at least 33 percent of the employees (excluding any part-time employees); and

(II) at least 50 employees (excluding any part-time employees); or

(ii) at least 500 employees (excluding any part-time employees);

(4) the term "representative" means an exclusive representative of employees within the meaning of section 9(a) or 8(f) of the National Labor Relations Act (29 U.S.C. 159(a), 158(f)) or section 2 of the Railway Labor Act (45 U.S.C. 152);

(5) the term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer;

(6) subject to subsection (b), the term "employment loss" means (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period;

(7) the term "unit of local government" means any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers; and

(8) the term "part-time employee" means an employee who is employed for an average of fewer than 20 hours per

week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

(b) Exclusions from definition of employment loss.

(1) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 3 of this Act [29 USC § 2102], up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 3 of this Act [29 USC § 2102]. Notwithstanding any other provision of this Act [29 USC §§ 2101 *et seq.*], any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

(2) Notwithstanding subsection (a)(6), an employee may not be considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff—

(A) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment; or

(B) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

§ 2102. Notice Required Before Plant Closings and Mass Layoffs.

(a) NOTICE TO EMPLOYEES, STATE DISLOCATED WORKER UNITS, AND LOCAL GOVERNMENTS.—An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order—

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act) and the chief elected official of the unit of local government within which such closing or layoff is to occur.

If there is more than one such unit, the unit of local government which the employer shall notify is the unit of local government to which the employer pays the highest taxes for the year preceding the year for which the determination is made.

(b) REDUCTION OF NOTIFICATION PERIOD.—(1) An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(2)(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

(B) No notice under this Act shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States.

(3) An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.

(c) EXTENSION OF LAYOFF PERIOD.—A layoff of more than 6 months which, at its outset, was announced to be a layoff of 6 months or less, shall be treated as an employment loss under this Act unless—

(1) the extension beyond 6 months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and

(2) notice is given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required.

(d) DETERMINATIONS WITH RESPECT TO EMPLOYMENT LOSS.—For purposes of this section, in determining whether a plant closing or mass layoff has occurred or will occur, employment losses for 2 or more groups at a single site of employment, each of which is less than the minimum number of employees specified in section 2(a) (2) or (3) but which in the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this Act.

§ 2103. Exemptions.

This Act shall not apply to a plant closing or mass layoff if –

(1) the closing is of a temporary facility or the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking; or

(2) the closing or layoff constitutes a strike or constitutes a lockout not intended to evade the requirements of this Act. Nothing in this Act shall require an employer to serve written notice pursuant to section 3(a) of this Act when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act: Provided, That nothing in this Act shall be deemed to validate or invalidate any judicial or administrative ruling relating to the hiring of permanent replacements for economic strikers under the National Labor Relations Act.

§ 2104. Administration and enforcement of requirements

(a) Civil actions against employers.

(1) Any employer who orders a plant closing or mass layoff in violation of section 3 of this Act [29 USCS § 2102] shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—

(A) back pay for each day of violation at a rate of compensation not less than the higher of—

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; and

(B) benefits under an employee benefit plan described in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)), including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by—

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; and

(C) any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation.

In addition, any liability incurred under paragraph (1) with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

(3) Any employer who violates the provisions of section 3 with respect to a unit of local government shall be subject to a civil penalty of not more than $ 500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

(4) If an employer which has violated this Act proves to the satisfaction of the court that the act or omission that violated this Act was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Act the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section.

(5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

(6) In any such suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

(7) For purposes of this subsection, the term[,] "aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with section 3 [29 USCS § 2102], did not receive timely notice either directly or through his or her representative as required by section 3 [29 USCS § 2102].

(b) Exclusivity of remedies. The remedies provided for in this section shall be the exclusive remedies for any violation of this Act [29 USCS §§ 2101 *et seq.*]. Under this Act [29 USCS §§ 2101 *et seq.*], a Federal court shall not have authority to enjoin a plant closing or mass layoff.

§ 2105. Procedures in addition to other rights of employees

The rights and remedies provided to employees by this Act [29 USCS §§ 2101 *et seq.*] are in addition to, and not in lieu

of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this Act shall run concurrently with any period of notification required by contract or by any other statute.

§ 2106. Procedures Encouraged Where Not Required.

It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 3 should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.

§ 2107. Authority to Prescribe Regulations.

(a) The Secretary of Labor shall prescribe such regulations as may be necessary to carry out this Act. Such regulations shall, at a minimum, include interpretative regulations describing the methods by which employers may provide for appropriate service of notice as required by this Act.

(b) The mailing of notice to an employee's last known address or inclusion of notice in the employee's paycheck will be considered acceptable methods for fulfillment of the employer's obligation to give notice to each affected employee under this Act.

§ 2108. Effect on Other Laws.

The giving of notice pursuant to this Act, if done in good faith compliance with this Act, shall not constitute a violation of the National Labor Relations Act or the Railway Labor Act.

§ 2109. Report on Employment and International Competitiveness.

Two years after the date of enactment of this Act the Comptroller General shall submit to the Committee on Small Business of both the House and Senate, the Committee on Labor and Human Resources, and the Committee on Education and Labor a report containing a detailed and objective analysis of the effect of this Act on employers (especially small- and medium-sized businesses), the economy (international competitiveness), and employees (in terms of levels and conditions of employment). The Comptroller General shall assess both costs and benefits, including the effect on productivity, competitiveness, unemployment rates and compensation, and worker retraining and readjustment.

APPENDIX F

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT, Code of Federal Regulations, 5 CFR §§ 639-10

Sec. 639.1 Purpose and scope.

(a) Purpose of WARN. The Worker Adjustment and Retraining Notification Act (WARN or the Act) provides protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. WARN also provides for notice to State dislocated worker units so that dislocated worker assistance can be promptly provided. (b) Scope of these regulations. These regulations establish basic definitions and rules for giving notice, implementing the provisions of WARN. The Department's objective is to establish clear principles and broad guidelines which can be applied in specific circumstances. However, the Department recognizes that Federal rulemaking cannot address the multitude of industry and company-specific situations in which advance notice will be given. (c) Notice encouraged where not required. Section 7 of the Act states: It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 3 should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce. (d) WARN enforcement. Enforcement of WARN will be through the courts, as provided in section 5 of the statute. Employees, their representatives and units of local government may initiate civil actions against employers believed to be in violation of Sec. 3 of the Act. The Depart-

ment of Labor has no legal standing in any enforcement action and, therefore, will not be in a position to issue advisory opinions of specific cases. The Department will provide assistance in understanding these regulations and may revise them from time to time as may be necessary. (e) Notice in ambiguous situations. It is civically desirable and it would appear to be good business practice for an employer to provide advance notice to its workers or unions, local government and the State when terminating a significant number of employees. In practical terms, there are some questions and ambiguities of interpretation inherent in the application of WARN to business practices in the market economy that cannot be addressed in these regulations. It is therefore prudent for employers to weigh the desirability of advance notice against the possibility of expensive and time-consuming litigation to resolve disputes where notice has not been given. The Department encourages employers to give notice in all circumstances. (f) Coordination with job placement and retraining programs. The Department, through these regulations and through the Trade Adjustment Assistance Program (TAA) and Economic Dislocation and Worker Adjustment Assistance Act (EDWAA) regulations, encourages maximum coordination of the actions and activities of these programs to assure that the negative impact of dislocation on workers is lessened to the extent possible. By providing for notice to the State dislocated worker unit, WARN notice begins the process of assisting workers who will be dislocated. (g) WARN not to supersede other laws and contracts. The provisions of WARN do not supersede any laws or collective bargaining agreements that provide for additional notice or additional rights and remedies. If such law or agreement provides for a longer notice period, WARN notice shall run concurrently with that additional notice period. Collective bargaining agreements may be used to clarify or amplify the terms and conditions of WARN, but may not reduce WARN rights.

Sec. 639.2 What does WARN require?

WARN requires employers who are planning a plant closing or a mass layoff to give affected employees at least 60 days' notice of such an employment action. While the 60-day period is the minimum for advance notice, this provision is not intended to discourage employers from voluntarily providing longer periods of advance notice. Not all plant closings and layoffs are subject to the Act, and certain employment thresholds must be reached before the Act applies. WARN sets out specific exemptions, and provides for a reduction in the notification period in particular circumstances. Damages and civil penalties can be assessed against employers who violate the Act.

Sec. 639.3 Definitions.

(a) Employer. (1) The term "employer" means any business enterprise that employs—(i) 100 or more employees, excluding part-time employees; or (ii) 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of hours of overtime. Workers on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees. An employee has a "reasonable expectation of recall" when he/she understands, through notification or through industry practice, that his/her employment with the employer has been temporarily interrupted and that he/she will be recalled to the same or to a similar job. The term "employer" includes nonprofit organizations of the requisite size. Regular Federal, State, local and federally recognized Indian tribal governments are not covered. However, the term "employer" includes public and quasi-public entities which engage in business (i.e., take part in a commercial or industrial enterprise, supply a service or good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments), and which are separately organized from the regular government, which have their own

governing bodies and which have independent authority to manage their personnel and assets. (2) Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations. (3) Workers, other than part-time workers, who are exempt from notice under section 4 of WARN are nonetheless counted as employees for purposes of determining coverage as an employer. (4) An employer may have one or more sites of employment under common ownership or control. An example would be a major auto maker which has dozens of automobile plants throughout the country. Each plant would be considered a site of employment, but there is only one "employer", the auto maker. (b) Plant closing. The term "plant closing" means the permanent or temporary shutdown of a "single site of employment", or one or more "facilities or operating units" within a single site of employment, if the shutdown results in an "employment loss" during any 30-day period at the single site of employment for 50 or more employees, excluding any part-time employees. An employment action that results in the effective cessation of production or the work performed by a unit, even if a few employees remain, is a shutdown. A "temporary shutdown" triggers the notice requirement only if there are a sufficient number of terminations, layoffs exceeding 6 months, or reductions in hours of work as specified under the definition of "employment loss." (c) Mass layoff. (1) The term "mass layoff" means a reduction in force which first, is not the result of a plant closing, and second, results in an employment loss at the single site of employment during any 30-day period for:

(i) At least 33 percent of the active employees, excluding part-time employees, and (ii) At least 50 employees, excluding part-time employees. Where 500 or more employees (excluding part-time employees) are affected, the 33% requirement does not apply, and notice is required if the other criteria are met. Plant closings involve employment loss which results from the shutdown of one or more distinct units within a single site or the entire site. A mass layoff involves employment loss, regardless of whether one or more units are shut down at the site. (2) Workers, other than part-time workers, who are exempt from notice under section 4 of WARN are nonetheless counted as employees for purposes of determining coverage as a plant closing or mass layoff. For example, if an employer closes a temporary project on which 10 permanent and 40 temporary workers are employed, a covered plant closing has occurred although only 10 workers are entitled to notice. (d) Representative. The term "representative" means an exclusive representative of employees within the meaning of section 9(a) or 8(f) of the National Labor Relations Act or section 2 of the Railway Labor Act. (e) Affected employees. The term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer. This includes individually identifiable employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such individual workers reasonably can be identified at the time notice is required to be given. The term "affected employees" includes managerial and supervisory employees, but does not include business partners. Consultant or contract employees who have a separate employment relationship with another employer and are paid by that other employer, or who are self-employed, are not "affected employees" of the business to which they are assigned. In addition, for purposes of determining whether coverage thresholds are met, either incumbent workers in jobs being eliminated or, if known 60

days in advance, the actual employees who suffer an employment loss may be counted. (f) Employment loss. (1) The term "employment loss" means (i) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (ii) a layoff exceeding 6 months, or (iii) a reduction in hours of work of individual employees of more than 50% during each month of any 6-month period. (2) Where a termination or a layoff (see paragraphs (f)(1)(i) and (ii) of this section) is involved, an employment loss does not occur when an employee is reassigned or transferred to employer-sponsored programs, such as retraining or job search activities, as long as the reassignment does not constitute a constructive discharge or other involuntary termination. (3) An employee is not considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff—(i) The employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment, or (ii) The employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later. (4) A "relocation or consolidation" of part or all of an employer's business, for purposes of paragraph Sec. 639.3(h)(4), means that some definable business, whether customer orders, product lines, or operations, is transferred to a different site of employment and that transfer results in a plant closing or mass layoff. (g) Unit of local government. The term "unit of local government" means any general purpose political subdivision of a State, which has the power to levy taxes and spend funds and which also has general corporate and police powers. When a covered employment site is located in more than one unit of local government, the employer must give notice to the unit to which it

determines it directly paid the highest taxes for the year preceding the year for which the determination is made. All local taxes directly paid to the local government should be aggregated for this purpose. (h) Part-time employee. The term "part-time" employee means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required, including workers who work full-time. This term may include workers who would traditionally be understood as "seasonal" employees. The period to be used for calculating whether a worker has worked "an average of fewer than 20 hours per week" is the shorter of the actual time the worker has been employed or the most recent 90 days. (i) Single site of employment. (1) A single site of employment can refer to either a single location or a group of contiguous locations. Groups of structures which form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment. (2) There may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within such a building. For example, an office building housing 50 different businesses will contain 50 single sites of employment. The offices of each employer will be its single site of employment. (3) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another. (4) Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site. For example, assembly plants which are located on opposite sides of a town and which are managed by a single employer

are separate sites if they employ different workers. (5) Contiguous buildings owned by the same employer which have separate management, produce different products, and have separate workforces are considered separate single sites of employment. (6) For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes. (7) Foreign sites of employment are not covered under WARN. U.S. workers at such sites are counted to determine whether an employer is covered as an employer under Sec. 639.3(a). (8) The term "single site of employment" may also apply to truly unusual organizational situations where the above criteria do not reasonably apply. The application of this definition with the intent to evade the purpose of the Act to provide notice is not acceptable. (j) Facility or operating unit. The term "facility" refers to a building or buildings. The term "operating unit" refers to an organizationally or operationally distinct product, operation, or specific work function within or across facilities at the single site. (k) State dislocated worker unit. The term "State dislocated worker unit" means a unit designated or created in each State by the Governor under title III of the Job Training Partnership Act, as amended by EDWAA. (l) State. For the purpose of WARN, the term "State" includes the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.

Sec. 639.4 Who must give notice?

Section 3(a) of WARN states that "an employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order * * *." Therefore, an employer who is anticipating

carrying out a plant closing or mass layoff is required to give notice to affected employees or their representative(s), the State dislocated worker unit and the chief elected official of a unit of local government. (See definitions in Sec. 639.3 of this part.) (a) It is the responsibility of the employer to decide the most appropriate person within the employer's organization to prepare and deliver the notice to affected employees or their representative(s), the State dislocated worker unit and the chief elected official of a unit of local government. In most instances, this may be the local site plant manager, the local personnel director or a labor relations officer. (b) An employer who has previously announced and carried out a short-term layoff (6 months or less) which is being extended beyond 6 months due to business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff is required to give notice when it becomes reasonably foreseeable that the extension is required. A layoff extending beyond 6 months from the date the layoff commenced for any other reason shall be treated as an employment loss from the date of its commencement. (c) In the case of the sale of part or all of a business, section 2(b)(1) of WARN defines who the "employer" is. The seller is responsible for providing notice of any plant closing or mass layoff which takes place up to and including the effective date (time) of the sale, and the buyer is responsible for providing notice of any plant closing or mass layoff that takes place thereafter. Affected employees are always entitled to notice; at all times the employer is responsible for providing notice. (1) If the seller is made aware of any definite plans on the part of the buyer to carry out a plant closing or mass layoff within 60 days of purchase, the seller may give notice to affected employees as an agent of the buyer, if so empowered. If the seller does not give notice, the buyer is, nevertheless, responsible to give notice. If the seller gives notice as the buyer's agent, the responsibility for notice still remains with the buyer. (2) It may be prudent for

the buyer and seller to determine the impacts of the sale on workers, and to arrange between them for advance notice to be given to affected employees or their representative(s), if a mass layoff or plant closing is planned.

Sec. 639.5 When must notice be given?

(a) General rule. (1) With certain exceptions discussed in paragraphs (b), (c) and (d) of this section and in Sec. 639.9 of this part, notice must be given at least 60 calendar days prior to any planned plant closing or mass layoff, as defined in these regulations. When all employees are not terminated on the same date, the date of the first individual termination within the statutory 30-day or 90-day period triggers the 60-day notice requirement. A worker's last day of employment is considered the date of that worker's layoff. The first and each subsequent group of terminees are entitled to a full 60 days' notice. In order for an employer to decide whether issuing notice is required, the employer should—(i) Look ahead 30 days and behind 30 days to determine whether employment actions both taken and planned will, in the aggregate for any 30-day period, reach the minimum numbers for a plant closing or a mass layoff and thus trigger the notice requirement; and (ii) Look ahead 90 days and behind 90 days to determine whether employment actions both taken and planned each of which separately is not of sufficient size to trigger WARN coverage will, in the aggregate for any 90-day period, reach the minimum numbers for a plant closing or a mass layoff and thus trigger the notice requirement. An employer is not, however, required under section 3(d) to give notice if the employer demonstrates that the separate employment losses are the result of separate and distinct actions and causes, and are not an attempt to evade the requirements of WARN. (2) The point in time at which the number of employees is to be measured for the purpose of determining coverage is the date the first notice is required to be given. If this "snapshot" of the number of employees employed on that date is clearly

unrepresentative of the ordinary or average employment level, then a more representative number can be used to determine coverage. Examples of unrepresentative employment levels include cases when the level is near the peak or trough of an employment cycle or when large upward or downward shifts in the number of employees occur around the time notice is to be given. A more representative number may be an average number of employees over a recent period of time or the number of employees on an alternative date which is more representative of normal employment levels. Alternative methods cannot be used to evade the purpose of WARN, and should only be used in unusual circumstances. (b) Transfers. (1) Notice is not required in certain cases involving transfers, as described under the definition of "employment loss" at Sec. 639.3(f) of this part. (2) An offer of reassignment to a different site of employment should not be deemed to be a "transfer" if the new job constitutes a constructive discharge. (3) The meaning of the term "reasonable commuting distance" will vary with local and industry conditions. In determining what is a "reasonable commuting distance", consideration should be given to the following factors: geographic accessibility of the place of work, the quality of the roads, customarily available transportation, and the usual travel time. (4) In cases where the transfer is beyond reasonable commuting distance, the employer may become liable for failure to give notice if an offer to transfer is not accepted within 30 days of the offer or of the closing or layoff (whichever is later). Depending upon when the offer of transfer was made by the employer, the normal 60-day notice period may have expired and the plant closing or mass layoff may have occurred. An employer is, therefore, well advised to provide 60-day advance notice as part of the transfer offer. (c) Temporary employment. (1) No notice is required if the closing is of a temporary facility, or if the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees

were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking. (2) Employees must clearly understand at the time of hire that their employment is temporary. When such understandings exist will be determined by reference to employment contracts, collective bargaining agreements, or employment practices of an industry or a locality, but the burden of proof will lie with the employer to show that the temporary nature of the project or facility was clearly communicated should questions arise regarding the temporary employment understandings. (3) Employers in agriculture and construction frequently hire workers for harvesting, processing, or for work on a particular building or project. Such work may be seasonal but recurring. Such work falls under this exemption if the workers understood at the time they were hired that their work was temporary. In uncertain situations, it may be prudent for employers to clarify temporary work understandings in writing when workers are hired. The same employers may also have permanent employees who work on a variety of jobs and tasks continuously through most of the calendar year. Such employees are not included under this exemption. Giving written notice that a project is temporary will not convert permanent employment into temporary work, making jobs exempt from WARN. (4) Certain jobs may be related to a specific contract or order. Whether such jobs are temporary depends on whether the contract or order is part of a long-term relationship. For example, an aircraft manufacturer hires workers to produce a standard airplane for the U.S. fleet under a contract with the U.S. Air Force with the expectation that its contract will continue to be renewed during the foreseeable future. The employees of this manufacturer would not be considered temporary. (d) Strikes or lockouts. The statute provides an exemption for strikes and lockouts which are not intended to evade the requirements of the Act. A lockout occurs when, for tactical or defensive reasons during the course of collective bargaining or during a

labor dispute, an employer lawfully refuses to utilize some or all of its employees for the performance of available work. A lockout not related to collective bargaining which is intended as a subterfuge to evade the Act does not qualify for this exemption. A plant closing or mass layoff at a site of employment where a strike or lockout is taking place, which occurs for reasons unrelated to a strike or lockout, is not covered by this exemption. An employer need not give notice when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act. Non-striking employees at the same single site of employment who experience a covered employment loss as a result of a strike are entitled to notice; however, situations in which a strike or lockout affects non-striking employees at the same plant may constitute an unforeseeable business circumstance, as discussed in Sec. 639.9, and reduced notice may apply. Similarly, the "faltering company" exception, also discussed in Sec. 639.9 may apply in strike situations. Where a union which is on strike represents more than one bargaining unit at the single site, non-strikers includes the non-striking bargaining unit(s). Notice also is due to those workers who are not a part of the bargaining unit(s) which is involved in the labor negotiations that led to the lockout. Employees at other plants which have not been struck, but at which covered plant closings or mass layoffs occur as a direct or indirect result of a strike or lockout are not covered by the strike/lockout exemption. The unforeseeable business circumstances exception to 60 days' notice also may apply to these closings or layoffs at other plants.

Sec. 639.6 Who must receive notice?

Section 3(a) of WARN provides for notice to each representative of the affected employees as of the time notice is required to be given or, if there is no such representative at that time, to each affected employee. Notice also must be served on the State dislocated worker unit and the chief

elected official of the unit of local government within which a closing or layoff is to occur. Section 2(b)(1) of the Act states that "any person who is an employee of the seller (other than a parttime employee) as of the effective date [time] of the sale shall be considered an employee of the purchaser immediately after the effective date [time] of the sale." This provision preserves the notice rights of the employees of a business that has been sold, but creates no other employment rights. Although a technical termination of the seller's employees may be deemed to have occurred when a sale becomes effective, WARN notice is only required where the employees, in fact, experience a covered employment loss. (a) Representative(s) of affected employees. Written notice is to be served upon the chief elected officer of the exclusive representative(s) or bargaining agent(s) of affected employees at the time of the notice. If this person is not the same as the officer of the local union(s) representing affected employees, it is recommended that a copy also be given to the local union official(s). (b) Affected employees. Notice is required to be given to employees who may reasonably be expected to experience an employment loss. This includes employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such workers can be identified at the time notice is required to be given. If, at the time notice is required to be given, the employer cannot identify the employee who may reasonably be expected to experience an employment loss due to the elimination of a particular position, the employer must provide notice to the incumbent in that position. While part-time employees are not counted in determining whether plant closing or mass layoff thresholds are reached, such workers are due notice. (c) State dislocated worker unit. Notice is to be served upon the State dislocated worker unit. Since the States are restructuring to implement training under EDWAA, service of notice upon the State Governor constitutes service upon the State dislocated worker unit until such time as the Governor makes public State

procedures for serving notice to this unit. (d) Chief elected official of the unit of local government. The identity of the chief elected official will vary according to the local government structure. In the case of elected boards, the notice is to be served upon the board's chairperson.

Sec. 639.7 What must the notice contain?

(a) Notice must be specific. (1) All notice must be specific. (2) Where voluntary notice has been given more than 60 days in advance, but does not contain all of the required elements set out in this section, the employer must ensure that all of the information required by this section is provided in writing to the parties listed in Sec. 639.6 at least 60 days in advance of a covered employment action. (3) Notice may be given conditional upon the occurrence or nonoccurrence of an event, such as the renewal of a major contract, only when the event is definite and the consequences of its occurrence or nonoccurrence will necessarily, in the normal course of business, lead to a covered plant closing or mass layoff less than 60 days after the event. For example, if the non-renewal of a major contract will lead to the closing of the plant that produces the articles supplied under the contract 30 days after the contract expires, the employer may give notice at least 60 days in advance of the projected closing date which states that if the contract is not renewed, the plant closing will occur on the projected date. The notice must contain each of the elements set out in this section. (4) The information provided in the notice shall be based on the best information available to the employer at the time the notice is served. It is not the intent of the regulations, that errors in the information provided in a notice that occur because events subsequently change or that are minor, inadvertent errors are to be the basis for finding a violation of WARN. (b) As used in this section, the term "date" refers to a specific date or to a 14-day period during which a separation or separations are expected to occur. If separations are planned according to a schedule, the schedule

should indicate the specific dates on which or the beginning date of each 14-day period during which any separations are expected to occur. Where a 14-day period is used, notice must be given at least 60 days in advance of the first day of the period. (c) Notice to each representative of affected employees is to contain: (1) The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information; (2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect; (3) The expected date of the first separation and the anticipated schedule for making separations; (4) The job titles of positions to be affected and the names of the workers currently holding affected jobs. The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known. (d) Notice to each affected employee who does not have a representative is to be written in language understandable to the employees and is to contain: (1) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect; (2) The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated; (3) An indication whether or not bumping rights exist; (4) The name and telephone number of a company official to contact for further information. The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known. (e) The notices separately provided to the State dislocated worker unit and to the chief elected official of the unit of local government are to contain: (1) The name and address of the employment site where the plant closing or

mass layoff will occur, and the name and telephone number of a company official to contact for further information; (2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect; (3) The expected date of the first separation, and the anticipated schedule for making separations; (4) The job titles of positions to be affected, and the number of affected employees in each job classification; (5) An indication as to whether or not bumping rights exist; (6) The name of each union representing affected employees, and the name and address of the chief elected officer of each union. The notice may include additional information useful to the employees such as a statement of whether the planned action is expected to be temporary and, if so, its expected duration. (f) As an alternative to the notices outlined in paragraph (e) above, an employer may give notice to the State dislocated worker unit and to the unit of local government by providing them with a written notice stating the name of address of the employment site where the plant closing or mass layoff will occur; the name and telephone number of a company official to contact for further information; the expected date of the first separation; and the number of affected employees. The employer is required to maintain the other information listed in Sec. 639.7(e) on site and readily accessible to the State disclocated worker unit and to the unit of general local government. Should this information not be available when requested, it will be deemed a failure to give required notice.

Sec. 639.8 How is the notice served?

Any reasonable method of delivery to the parties listed under Sec. 639.6 of this part which is designed to ensure receipt of notice of least 60 days before separation is acceptable (e.g., first class mail, personal delivery with optional signed receipt). In the case of notification directly to affected employees, insertion of notice into pay envelopes is another

viable option. A ticketed notice, i.e., preprinted notice regularly included in each employee's pay check or pay envelope, does not meet the requirements of WARN.

Sec. 639.9 When may notice be given less than 60 days in advance?

Section 3(b) of WARN sets forth three conditions under which the notification period may be reduced to less than 60 days. The employer bears the burden of proof that conditions for the exceptions have been met. If one of the exceptions is applicable, the employer must give as much notice as is practicable to the union, non-represented employees, the State dislocated worker unit, and the unit of local government and this may, in some circumstances, be notice after the fact. The employer must, at the time notice actually is given, provide a brief statement of the reason for reducing the notice period, in addition to the other elements set out in Sec. 639.7. (a) The exception under section 3(b)(1) of WARN, termed "faltering company", applies to plant closings but not to mass layoffs and should be narrowly construed. To qualify for reduced notice under this exception: (1) An employer must have been actively seeking capital or business at the time that 60-day notice would have been required. That is, the employer must have been seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit, or business through any other commercially reasonable method. The employer must be able to identify specific actions taken to obtain capital or business. (2) There must have been a realistic opportunity to obtain the financing or business sought. (3) The financing or business sought must have been sufficient, if obtained, to have enabled the employer to avoid or postpone the shutdown. The employer must be able to objectively demonstrate that the amount of capital or the volume of new business sought would have enabled the employer to

keep the facility, operating unit, or site open for a reasonable period of time. (4) The employer reasonably and in good faith must have believed that giving the required notice would have precluded the employer from obtaining the needed capital or business. The employer must be able to objectively demonstrate that it reasonably thought that a potential customer or source of financing would have been unwilling to provide the new business or capital if notice were given, that is, if the employees, customers, or the public were aware that the facility, operating unit, or site might have to close. This condition may be satisfied if the employer can show that the financing or business source would not choose to do business with a troubled company or with a company whose workforce would be looking for other jobs. The actions of an employer relying on the "faltering company" exception will be viewed in a company-wide context. Thus, a company with access to capital markets or with cash reserves may not avail itself of this exception by looking solely at the financial condition of the facility, operating unit, or site to be closed. (b) The "unforeseeable business circumstances" exception under section 3(b)(2)(A) of WARN applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required. (1) An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance. (2) The test for determining when business circumstances are not reasonably foreseeable focuses on an

emp[illegible]'s business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services. (c) The "natural disaster" exception in section 3(b)(2)(B) of WARN applies to plant closings and mass layoffs due to any form of a natural disaster. (1) Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature are natural disasters under this provision. (2) To qualify for this exception, an employer must be able to demonstrate that its plant closing or mass layoff is a direct result of a natural disaster. (3) While a disaster may preclude full or any advance notice, such notice as is practicable, containing as much of the information required in Sec. 639.7 as is available in the circumstances of the disaster still must be given, whether in advance or after the fact of an employment loss caused by a natural disaster. (4) Where a plant closing or mass layoff occurs as an indirect result of a natural disaster, the exception does not apply but the "unforeseeable business circumstance" exception described in paragraph (b) of this section may be applicable.

Sec. 639.10 When may notice be extended?

Additional notice is required when the date or schedule of dates of a planned plant closing or mass layoff is extended beyond the date or the ending date of any 14-day period announced in the original notice as follows: (a) If the postponement is for less than 60 days, the additional notice should be given as soon as possible to the parties identified in Sec. 639.6 and should include reference to the earlier notice, the date (or 14-day period) to which the planned action is postponed, and the reasons for the postponement. The notice should be given in a manner which will provide the information to all affected employees. (b) If the postponement is

for 60 days or more, the additional notice should be treated as new notice subject to the provisions of Sec. Sec. 639.5, 639.6 and 639.7 of this part. Rolling notice, in the sense of routine periodic notice, given whether or not a plant closing or mass layoff is impending, and with the intent to evade the purpose of the Act rather than give specific notice as required by WARN, is not acceptable.

No. 05-1653

IN THE

Supreme Court of the United States

CHARLES T. WILSON, *et al.*,

Petitioners,

—v.—

AIRTHERM PRODUCTS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

When the WARN Act provides, in the context of a sale of a business, that the seller's employee "as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale," 29 U.S.C. § 2101(b)(1), is it the seller or the buyer who is responsible for providing notice under 29 U.S.C. § 2102 if 50 or more employees are not offered employment by the buyer?

LIST OF PARTIES

The petition for certiorari accurately identifies petitioners.

Respondent Airtherm Products, Inc., is an Arkansas corporation. It is a wholly-owned subsidiary of Airtherm Manufacturing Company, a Missouri corporation. There are no publicly held corporations that own 10% or more of the stock of Airtherm Manufacturing Company.

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Because the United States Court of Appeals for the Eighth Circuit properly resolved this appeal, *Wilson v. Airtherm Products, Inc.*, 436 F.3d 906 (8th Cir. 2006), and because there is no conflict among the Courts of Appeals, the petition for certiorari should be denied.

STATEMENT OF THE CASE

The question in this case, arising in the context of a sale of an on-going business, is who has responsibility—the seller or the buyer—to provide notice under the Workers Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. §§ 2101 *et seq.*, if (a) the workers at a plant remained employed by the seller as of the date of the sale, and (b) the buyer decides not to offer employment to 50 or more of them. The Eighth Circuit held that the buyer has the notice responsibility, because it is the one who decides how many workers continue in employment after the sale. Every other Court of Appeals that has considered the same question has decided it the same way. The plain language of the statute, ignored by petitioners, requires this result, as does common sense. There is no basis for a grant of a writ of certiorari in this case.

This case involves the sale of a manufacturing plant in Forrest City, Arkansas, from Airtherm Products, Inc. ("API"), to Airtherm LLC ("ALLC").[1] API retained the employees through the date of sale. Having sold the plant to ALLC, it terminated their employment under their collective bargaining agreement as of that date and paid their severance benefits.[2]

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[1] In order to avoid confusion, this brief adopts the abbreviations used by the Eighth Circuit in its opinion.

[2] Like every other Court of Appeals to consider the question, the Eighth Circuit held that the termination of a collective bargaining

Even though the Forrest City plant remained open after the sale, the WARN Act defines a "plant closing" to include "an employment loss . . . for 50 or more employees." 29 U.S.C. § 2101(a)(2). Employees are entitled to 60 days notice of a plant closing under 29 U.S.C. § 2102. However, § 2101 (b)(1) makes clear that the mere sale of a plant does not constitute a plant closing, and it assigns to the buyer responsibility for those workers who remained employed by the seller on the date of sale:

> After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff. . . . [A]ny person who is an employee of the seller . . . as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

Consistent with the plain language of the statute, ALLC contractually assumed all liability for WARN Act violations, if any. Consistent with its responsibilities, ALLC offered employment to the vast majority of API's employees.[3]

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agreement does not necessarily constitute termination under the WARN Act:

> [A] decision to technically terminate employment or close a plant to achieve a desired effect on labor relations does not answer the questions of whether there is a plant closing for purposes of the WARN Act or who has notification responsibility if a plant closing occurs. *See, e.g.*, [*International Alliance of Theatrical & Stage Employees v.*] *Compact Video Servs.*, [*Inc.*,] 50 F.3d [1464,] 1468 [(9th Cir.), *cert. denied*, 516 U.S. 987 (1995)].

Petn. App. at 12a n.4. Accord, *International Oil, Chem. & Atomic Workers v. Uno-Ven Co.*, 170 F.3d 779, 783-84 (7th Cir. 1999).

[3] Petitioners properly acknowledge that 74 of API's employees were hired by ALLC. Petn. at 4. They erroneously contest API's showing that only 123 workers were employed as of the date of sale.

Petitioner employees, many of whom both received severance benefits and continued in employment, brought this case against the seller. Their theory is that, because API terminated their employment on the day of sale, API had a duty to provide them with a WARN Act notice. They seek penalties for the failure to provide that notice, whether or not they suffered any actual economic loss. Petn at 18.

The Eighth Circuit followed the plain statutory language and held that, because the employees worked for the seller on the day of sale, they were deemed by § 2101(b)(1) to be employees of the buyer on the day after the sale, and so, at least for the purposes of the Act, the seller did not cause them to suffer an "employment loss" that required WARN Act notice. Petn. App. at 11a.

REASONS FOR DENYING THE PETITION

I. BECAUSE NO COURT OF APPEALS WOULD REQUIRE A SELLER TO GIVE NOTICE UNDER THESE CIRCUMSTANCES, THERE IS NO CONFLICT AMONG THE CIRCUITS.

In order to determine whether an actual conflict exists among the Courts of Appeals, this Court must first identify the question actually decided by the Eighth Circuit and presented by this petition. Leaving aside petitioners'

Petn. at 3 n.1. Although API had employed two additional workers within the prior sixty days, the record unequivocally shows that those two employees did not suffer an employment loss, having voluntarily resigned before the sale. Trial Transcript at 38. Because a resignation constitutes a "voluntary departure" within the meaning of § 2101(a)(6)(A), *Wiltz v. M/G Transport Services, Inc.*, 128 F.3d 657, 963 (6th Cir. 1997), all but 49 of API's covered employees were hired by ALLC.

somewhat tendentious description of the operative facts,[4] this case actually presents only the first question:

> 1. Must the seller give its employees 60 days notice of the termination?

Petn. at i. Petitioners' three remaining numbered questions all concern the obligations of the buyer; because the buyer, ALLC, has never been a party to this litigation, those questions are not properly presented by this petition. Petitioners' second set of questions, Petn. at i-ii, reflects their contention that the Eighth Circuit construed a rejected version of the WARN Act. Because, as demonstrated hereafter, the Eighth Circuit properly construed § 2101(b)(1) as adopted, these questions are not properly presented by this petition.

With regard to the question actually presented by this petition, petitioners have failed to demonstrate that any other Court of Appeals on these facts would require the seller to provide notice to its employees. The three cases on which petitioners rely are easily distinguished. Indeed, the Eighth Circuit cited as support for its rule the only two cases which actually discuss § 2101(b)(1).

Kalwaytis v. Preferred Meal Sys., 78 F.3d 117 (3d Cir. 1996), did not involve a sale of business at all. Probably for that reason, petitioners never cited the case in their Eighth Circuit briefs. The employer in that case did not sell its business, but claimed erroneously to have been a joint employer with the subcontractor that later hired its terminated employees. The Third Circuit expressly refused to consider precedents involving the sale-of-business exclusion. *Id.*, at 120. The Court did not impose WARN Act liability on the seller because there was no seller.

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[4] API believes that its counter-statement of the question presented more accurately reflects the issue actually before this Court.

An actual sale of an business was involved in *Headrick v. Rockwell Internat'l Corp.*, 24 F.3d 1272 (10th Cir. 1994), and the Tenth Circuit imposed no liability on the seller. In that case, the buyer assumed all of the seller's responsibilities, including an explicit assumption of its responsibility to its employees. *Id.*, at 1274 & n.3. Writing for the Court, Justice White found this explicit transfer of employment to the buyer sufficient to invoke the protection of § 2101(b)(1). *Id.*, at 1280-81. Neither the Tenth Circuit nor any other Court of Appeals has held such an explicit transfer to be necessary to invoke the protection of the sale-of-business provision.[5]

Indeed, petitioners themselves admit that the Ninth Circuit in *Compact Video Servs., supra,* "found no WARN Act liability on the part of the seller." Petn. at 14. It is true that the buyer notified most employees before the sale that they would be retained, but the Ninth Circuit expressly rejected such an argument as the basis of its decision:

> [N]othing in WARN requires a seller to insist upon a contract term guaranteeing its employees continued employment with the buyer. Had ATS simply decided not to hire any of the Compact employees at all, ATS, not Compact, would have had the responsibility for giving WARN notice.

50 F.3d at 1468. The Eighth Circuit explicitly relied on this language in holding that any notice requirement in this case would fall on the buyer, not the seller. Petn. App. at 11a.

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[5] The Eighth Circuit approved the Tenth Circuit's "functional common sense approach" in *Smullin v. Mity Enter., Inc.*, 420 F.3d 836, 839 (8th Cir. 2005), the opinion which adopted the "going concern" rule applied in this case.

Petitioners likewise concede, as they must, that the Eighth Circuit's exoneration of the seller in this case is consistent with holdings of the Sixth Circuit in *Wiltz, supra*, and the Seventh Circuit in *Uno-Ven, supra*. Because petitioners have utterly failed to identify any other Court of Appeals that would impose liability on API under these circumstances, there is no Circuit conflict justifying this Court's attention under its Rule 10(a).

II. THE EIGHTH CIRCUIT, LIKE ALL COURTS OF APPEALS, PROPERLY ASSIGNS NOTICE RESPONSIBILITY TO THE BUYER, BECAUSE THE BUYER DECIDES WHICH EMPLOYEES TO KEEP.

The law should be both clear and sensible. Companies need to know which party to a sale has the duty to give notice if 50 or more workers will lose their job. The seller does not know who the buyer will keep. The buyer may not even know who it will keep. However, the buyer is on notice under the law as interpreted by the Eighth Circuit and all other Courts of Appeals that, if it intends to leave more than 50 workers without a job, it must first give WARN Act notice. Once a seller has presented the buyer with a "going concern,"[6] including a workforce

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[6] Petitioners offer no good reason to reject the Eighth Circuit's conclusion that the failure of Congress to adopt a definition precisely describing the qualifying forms of conveyance indicated a broad scope for § 2101(b)(1):

> Congress instead used a more generic term, "sale of a business," which clearly connotes *any* transaction that transfers all or part of the employer's overall operations *as a going concern*. Construing the exclusion in this fashion is consistent with the purposes of the WARN Act because the buyer of a going concern is likely to retain a substantial proportion of the employees of the on-going business.

Smullin, 420 F.3d at 639 (emphasis in original). It is precisely the *Smullin* rule which the Eighth Circuit applied in this case. Petn. App. at 8a-9a.

employed on the date of the sale, it has qualified for protection under § 2101(b)(1).

Petitioners trudge through obscure legislative history in an attempt to overcome the plain language of the statute, which the petition never addresses. They discount Senator Metzenbaum's description of an earlier version of the legislation, Petn. at 14-15, but they do not mention his assurance that Senator Hatch's amendment, now codified as § 2101(b)(1), had merely "clarifie[d] our intent." 134 Cong. Rec. S 8680 (June 28, 1988). Tellingly, they offer no legislative history to support their contention that § 2101(b)(1) applies only when the seller transfers its employees "to the buyer's payroll at the time of the sale." Petn. at 20.[7]

Viewed from a distance, petitioners' claims are even more unsound. The continued operation of the plant with all but 49 of the same workers would not have constituted a WARN Act violation if the business had not been sold; a change of ownership makes no practical difference. This is precisely the reason that § 2101(b)(1) excludes the sale of a business from the definition of employment loss.

Here the business was sold as an ongoing operation. Not only did the employees work and get paychecks, but

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[7] Petitioners base this argument, not on conflicting decisions of other Courts of Appeals, but on dictum in an earlier Eighth Circuit opinion declaring that "when employees are transferred from seller to buyer as part of a sale, employees have not suffered an employment loss." *Burnsides v. MJ Optical, Inc.*, 183 F.3d 700, 702 (8th Cir. 1996). Neither *Burnsides* nor any other case has held that a buyer must assume contractual responsibility for seller's employees for the sale-of-business exclusion to apply. Although the Eighth Circuit noted in *Smullin* that "the timing of the plant closing on the day of sale became an issue in *Burnsides*," 420 F.3d at 840 n.2, that Court has now made clear in *Smullin* and this case that the seller's retention of its workforce on the payroll on the date of sale will transfer notice responsibility to the buyer under § 2101(b)(1).

they also got severance checks. In other words, they all got severance checks even though not all of them lost their employment. Despite this windfall to many, an artifact of the union agreement, they now seek to pile on WARN Act damages. Whatever Congress intended the WARN Act to do, it was not to provide a double windfall to employees who have kept their job.

CONCLUSION

There is no basis for certiorari in this case. The Courts of Appeals that have interpreted the statutory language have interpreted it correctly. There is no Circuit conflict. The reading the Circuits have given the statute accords with its plain language, makes common sense, and, to the extent it matters, is not contrary to any legislative history.

For these reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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